DOCKET

No. 88-429-ADX
Status: GRANTED

Title: Public Citizen, Appellant
v.
United States Department of Justice, et al.

Docketed:
September 9, 1988

Court: United States District Court
for the District of Columbia

Vide:
88-494

Counsel for appellant: Glitzenstein,Eric R.

Counsel for appellee: Kamenar,Paul D., Solicitor General, Lee,Rex E.

Entry	Date	Note	Proceedings and Orders
1	Sep 9 1988	G	Statement as to jurisdiction filed.
2	Sep 29 1988		Brief of appellee Washington Legal Foundation in response to appellant's jurisdictional statement filed.
4	Oct 12 1988		Order extending time to file response to jurisdictional statement until November 11, 1988.
5	Oct 14 1988		The above extension of time applies to all respondents.
6	Nov 10 1988		Brief of appellee American Bar Association in response to jurisdictional statement filed. VIDED.
7	Nov 10 1988		Memorandum of appellee United States filed. VIDED.
8	Nov 16 1988		DISTRIBUTED. December 2, 1988
9	Dec 5 1988		PROBABLE JURISDICTION NOTED. The case is consolidated with 88-494, and a total of one hour is allotted for oral argument. Justice Scalia OUT. **
10	Dec 23 1988		Record filed.
		*	Certified copy of original record recieved. (Vide: 88-494).
12	Jan 3 1989		Order extending time to file brief of appellant on the merits until January 28, 1989.
13	Jan 27 1989		Brief of appellant Public Citizen filed. VIDED.
14	Jan 28 1989		Joint appendix filed. VIDED.
15	Jan 28 1989		Brief of appellant Washington Legal Foundation filed. VIDED.
18	Feb 7 1989	D	Motion of the Acting Solicitor General for divided argument filed.
17	Feb 9 1989		Order extending time to file brief of appellee on the merits until March 6, 1989.
19	Feb 10 1989	G	Motion of appellants for divided argument filed.
20	Feb 21 1989		Motion of the Acting Solicitor General for divided argument DENIED. Justice Scalia OUT.
21	Feb 21 1989		Motion of appellants for divided argument GRANTED. Justice Scalia OUT.
22	Feb 22 1989		Order further extending time to file brief of appellee on the merits until March 11, 1989.
25	Mar 8 1989		SET FOR ARGUMENT, APRIL 17, 1989. (3rd CASE)
27	Mar 10 1989		Brief amicus curiae of AFL-CIO filed. VIDED.
26	Mar 11 1989		Brief of appellee American Bar Association filed. VIDED.
28	Mar 11 1989		Brief of appellee United States filed. VIDED.
29	Mar 11 1989		Brief amici curiae of People for the American Way Action Fund, et al. filed. VIDED.
30	Mar 15 1989		CIRCULATED.
31	Mar 28 1989		Lodging received. (8 copies). (Also filed in 88-494).

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No. 88-429-ADX

Entry	Date	Note	Proceedings and Orders
32	Apr 3 1989	X	Reply brief of appellant Public Citizen filed. VIDED.
36	Apr 4 1989	D	Motion of People for the American Way Action Fund, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
33	Apr 7 1989		Reply brief of appellant Washington Legal Foundation filed. VIDED.
34	Apr 7 1989		Lodging received. (Vide: 88-494).
35	Apr 10 1989		Lodging received. (10 copies). (Vide: 88-494).
37	Apr 17 1989		Motion of People for the American Way Action Fund, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED. Justice Scalia OUT.
38	Apr 17 1989		ARGUED.

JURISDICTIONAL

STATEMENT

88-429

No.

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

PUBLIC CITIZEN,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON LEGAL FOUNDATION, AND
AMERICAN BAR ASSOCIATION,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED*

Did the district court err in ruling that none of the requirements of the Federal Advisory Committee Act may constitutionally be applied to the Department of Justice's use of the American Bar Association's Standing Committee on the Federal Judiciary to obtain advice on prospective judicial nominees because all such requirements violate both the doctrine of separation of powers and the Appointments Clause of the Constitution?

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*Appellant Public Citizen was the plaintiff-intervenor in the proceedings below, appellee United States Department of Justice was the defendant, and appellee Washington Legal Foundation was the plaintiff. Appellee American Bar Association intervened as a party defendant after judgment was entered for the purpose of participating in this appeal. No other persons other than those named in the caption appeared in the district court.

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IN THE

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No. 88-

PUBLIC CITIZEN,

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v.

UNITED STATES DEPARTMENT OF JUSTICE,
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Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION AND ORDER BELOW

The opinion and order of the district court, which are not yet officially reported, are reproduced in an appendix to this jurisdictional statement (App. 1a-28a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on August 4, 1988, holding an Act of Congress unconstitutional. App. 28a. A notice of appeal to this Court was filed on September 1, 1988, in the district court. App. 29a. Because the district court declared an Act of Congress unconstitutional in a civil action to which the United States Department of Justice, an agency of the United States, was a party, this Court has exclusive jurisdiction under 28 U.S.C. § 1252. *See Donovan v. Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ..

The Federal Advisory Committee Act, 5 U.S.C. App. II, is set out in an appendix to this brief (App 31a-45a).

STATEMENT OF THE CASE

This appeal seeks reversal of a district court ruling that a statute enacted by Congress to regulate the executive branch's use of advisory committees is unconstitutional as applied to an advisory relationship of vital importance to the public — the Justice Department's use of the American Bar Association's Committee on the Federal Judiciary to assist it in screening potential federal judicial nominees. Before turning to the

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[1] Pub. L. No. 100-352, §§ 1, 7, 102 Stat. 662-664 repeals section 28 U.S.C. § 1252 as of September 25, 1988, but provides that this repeal has no effect on the method for reviewing judgments entered prior to the statute's effective date. Accordingly, appellant's only recourse is to seek review of the district court's decision in this Court.

facts of this case — which are straightforward and undisputed — we first provide a brief overview of why the Federal Advisory Committee Act was enacted, what its various provisions require, and how it has been implemented by federal agencies for the past 16 years.

1. The Federal Advisory Committee Act

After holding extensive hearings in 1970 and 1971 on the 3,200 federal advisory committees then "circulating about without any substantial control over them," Congress concluded that it was essential to establish a comprehensive system for regulating this influential "fifth arm of the government." *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 293 (1978) (remarks of Rep. Monagan). Accordingly, when the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), was enacted in 1972, Congress recognized that, while advisory committees are "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . . [,] standards and uniform procedures should govern the[ir] establishment, operation, administration and duration . . .." 5 U.S.C. App. II § 2(a). FACA was signed into law by President Nixon, who not only expressly endorsed the statute's "standards for the establishment, operation, termination, and control of advisory committees," but also issued an executive order requiring that the "heads of all executive departments and agencies shall take appropriate action to assure their ability to comply with the provisions of the Act." Executive Order 11686 (October 7, 1972).

FACA does not regulate the substance or subject matter of advisory committees, but instead establishes uniform rules governing their procedures and operations. Many of these rules parallel provisions found in other, comparable federal statutes, such as the Freedom of Information Act, 5 U.S.C. § 552, the Government-in-the-Sunshine Act, 5 U.S.C. § 552b, the Privacy Act, 5 U.S.C. § 552a, the Presidential Records Act of 1978, 44 U.S.C. § 2201, and the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note. And, as is true with these other statutory schemes, the implementation of FACA is assigned to executive branch officials.

The first responsibility created by FACA is that the head of each federal agency using an advisory committee must supervise the committee's activities and assure that the committee assembles and maintains its reports, records, and other papers. 5 U.S.C. App. II § 8(b). Second, the agency head must file a charter for the committee which, among other things, describes the committee's functions and objectives and identifies the agency official to whom the committee reports. *Id.* § 9(c). Third, the statute provides that agencies must generally provide the public with "timely notice" of committee meetings, that a designated federal official must attend each such meeting, and that a "complete and accurate" record of "matters discussed and conclusions reached" must be maintained by the agency. *Id.* §§ 10(a)(2), (e), (f). However, a committee meeting may be closed to the public in whole or in part if the agency determines that matters to be discussed at the meeting fall within one of the ten exemptions to the Government-in-the-Sunshine Act. *Id.* § 10(d).

Fourth, FACA requires that the agency maintain a public reading room with copies of the records of its advisory committees, but the Act authorizes the agency to withhold any records that fall within one of the nine exemptions to the Freedom of Information Act. *Id.* § 10(b). Finally, FACA requires that the membership of advisory committees must be "fairly balanced in terms of the points of view represented and the functions to be performed," *id.* §§ 5(b)(2), (c), although agencies have wide latitude in meeting this requirement by defining the functions of their committees, as well as the type of representation that is relevant to the performance of those functions. *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

Since 1972, thousands of advisory committees have been chartered in accordance with FACA and have complied with the Act's various requirements. During fiscal year 1987 alone, according to the President's most recent report on the implementation of FACA, 57 Federal departments and agencies sponsored 992 advisory committees under the Act; a total of 19,837 individuals served as members of properly chartered committees; 3,430 meetings were held in accordance with the Act (1,830 of which were either totally or partially closed under one or more of the Act's exemptions); and 695 reports were issued. *See Sixteenth Annual Report of the President on Federal Advisory Committees* at 1 (1988). Reflecting the "diverse interests of the sponsoring agencies, committee activities covered topics from national security to specific fiscal, social and technical issues," including review of the qualifications or credentials of individuals seeking various types of governmental grants and benefits. *Id.* at 1, 9, 44. The ruling below represents the first time that a court has declared any part of FACA unconstitutional as applied to any advisory committee.

2. The ABA Committee

For a number of years, a committee of the American Bar Association, officially known as the American Bar Association's Standing Committee on the Federal Judiciary ("ABA Committee"), has advised the Justice Department on potential nominees to the federal bench. Under the present system, the Department initiates the advisory process by requesting the ABA Committee to investigate and evaluate potential candidates' professional qualifications and to provide a formal set of recommendations to an Assistant Attorney General. App. 5a. Although the Department gathers information about prospective nominees from many sources, only the ABA Committee is consulted routinely before a nomination is made, and only the ABA Committee is given detailed information about judicial candidates to assist it in providing pre-nomination advice to the Department. *Id.*

The ABA's review process has "traditionally involved confidential interviews with lawyers, judges and professors in the nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications." *Washington Legal Foundation v. American Bar Ass'n*, 648 F. Supp. 1353, 1355 (D.D.C. 1986). After an investigation is completed, a report is prepared and circulated to the full ABA Committee, which then decides on a final recommendation — either "exceptionally well qualified," "well qualified," "qualified," or "not qualified." App. 6a. This recommendation is provided to the Justice Department, along with an indication of whether it is supported unanimously or simply by a majority of the Committee. *Id.* The rationale for a particular rating is "sometimes" provided to the Department as well. *Id.*

After the ABA Committee provides its recommendation, the Department, in conjunction with the President's judicial selection committee — which is not covered by FACA because it is composed entirely of full-time federal officials, *see* 5 U.S.C. App. II § 3(2)(C) — gathers information from other sources, including the Federal Bureau of Investigation and other government agencies. App. 5a. The Justice Department then forwards its recommendations to the President concerning the qualifications of persons who are being considered for federal judgeships. App. 7a. After the President makes his selection and the nomination is sent to the Senate, the ABA Committee's rating is routinely made public. *Id.*[2]

3. Proceedings Below

In 1986, the appellee Washington Legal Foundation ("WLF") filed a lawsuit directly against the ABA Committee, seeking a declaration that it is a federal advisory committee and must therefore comply with FACA. *See WLF v. ABA Committee, supra*, 648 F. Supp. at 1355. That lawsuit was dismissed on the ground that the proper defendant in this kind of FACA case is the government agency utilizing the committee — here, the Justice Department —and not a "private, preexisting group that has not been established, appointed, and financed by the government." *Id.* at 1361. That ruling is not at issue in this case.

Shortly before its lawsuit against the ABA Committee was dismissed, WLF filed this lawsuit against the Justice Department, asserting that, although the Department routinely solicits the ABA Committee's advice and recommendations regarding prospective judicial nominees, it is not complying with any of FACA's requirements. Jurisdiction in the district court was based on 28 U.S.C. § 1331. In response, the Justice Department moved to dismiss the complaint on two independent grounds: (1) the ABA Committee is not subject to FACA because it is not being utilized as a federal advisory committee; and (2) FACA cannot constitutionally be applied to the ABA Committee.

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[2] The ABA Committee is not used by the Justice Department to advise it concerning potential nominees to this Court, although the Committee does provide ratings of actual nominees to the Senate Judiciary Committee. Accordingly, because FACA applies only to the executive branch's establishment and use of advisory committees, and not to the Senate's, 5 U.S.C. App. II §§ 3(2), 3(3), the activities of the ABA Committee regarding nominees to this Court are not implicated, and will not be affected, by the Court's resolution of this case.

Upon learning that the Justice Department had challenged the constitutionality of FACA, appellant Public Citizen, a non-profit, public-interest organization, moved to intervene as a party plaintiff on the ground that "resolution of this case — especially the constitutional issue raised by the government — may have an enormous impact on Public Citizen's rights and interests under FACA in the future." Memorandum of Points and Authorities in Support of Motion to Intervene at 3. Neither WLF nor the Justice Department opposed Public Citizen's motion to intervene, and the motion was granted by the district court on March 11, 1987.

Along with its motion to intervene, Public Citizen filed a complaint for declaratory and injunctive relief and a motion for summary judgment, which were similar to the papers filed by WLF but differed in a number of significant respects. Thus, in its complaint, Public Citizen contended that the ABA Committee "is a federal advisory committee as that term is defined in section 3(2) of FACA, because defendant Department of Justice is, and has been, utilizing it in the interest of obtaining advice and/or recommendations." Complaint, ¶ 3. However, because FACA assigns the responsibility for implementing FACA's various provisions to the Department, and also affords the Department considerable flexibility in determining how those provisions should be implemented, Public Citizen recognized that it would be inappropriate for a court to rule on whether or how any of the statute's specific requirements should be met before the Department itself had an opportunity to make these determinations. Hence, Public Citizen's complaint simply asked the district court to enter an order "declaring that the Justice Department's utilization of the ABA Committee is covered by FACA, and ordering the Department to comply with FACA's requirements when it utilizes the ABA Committee in the future." Complaint, p. 4.

With respect to the Justice Department's constitutional defense, Public Citizen's memorandum in support of its motion for summary judgment pointed out that the Justice Department had never explained how, or even which of, FACA's various requirements would hamper the Department's use of the Committee, but instead had launched an "undifferentiated, generalized attack on the application of any and all of FACA's provisions . . . ." *Id.* at 2. Relying heavily on this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Public Citizen urged the district court to decide only those constitutional questions that must be resolved at this juncture, *i.e.*, the constitutionality of FACA's threshold requirements of filing a charter, designating a federal oversight officer, and announcing committee meetings in advance. Public Citizen's memorandum observed that the Justice Department had never argued that these requirements alone would impair its use of the ABA Committee. *Id.*

After all the parties filed motions for summary judgment, District Judge Joyce Hens Green issued her ruling denying plaintiffs' motions and entering judgment in favor of the Department. The district court agreed with plaintiffs that "the ABA Committee is an advisory committee 'utilized' by DOJ within the meaning of FACA, 5 U.S.C. App. II, § 3(2), but [held] that FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA to the ABA Committee has been demonstrated." App. 4a.

At the outset of its opinion, the district court rejected the Justice Department's statutory argument, finding that the Department's use of the Committee is covered by the "plain language of the statute," App. 7a, which, in relevant part, defines an "advisory committee" as "*any* committee" that is

> (B) established or *utilized* by the President,
> or
> (C) established or *utilized* by one or more agencies,
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government . . . .

5 U.S.C. App. II, § 3(2) (emphasis added). The district court derived further support for its conclusion that the ABA Committee is being "utilized" as an advisory committee from FACA's legislative history and prior interpretations by the courts, as well as from the General Services Administration's regulations construing the statute. App. 8a-14a. Thus, Judge Green found that the Department's use of the Committee constitutes precisely the sort of advisory relationship that Congress intended to subject to FACA's procedural requirements:

> [T]he ABA Committee is a formal committee, with a clearly defined structure, singular purpose, and apparently only two "clients" — the Attorney General and the Senate Judiciary Committee. The ABA Committee is not merely a group of casually associated individuals who are consulted singly; it self-consciously and purposefully acts "as a committee." The ABA Committee is thus a traditionally, routinely, and preferentially utilized source of advice for DOJ and the President on potential nominees for federal judgeships.

App. 10a-11a (footnotes omitted). Since the "plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all support the conclusion that the ABA Committee falls within FACA's definition of advisory committee," Judge Green reasoned that the constitutional issue raised by the Justice Department "cannot fairly be avoided" without "press[ing] statutory construction 'to the point of disingenuous evasion.'" App. 14a, *quoting United States v. Locke*, 471 U.S. 84, 96 (1985).

The district court then ruled that FACA is unconstitutional as applied to the ABA Committee, under both the Appointments Clause and the doctrine of separation of powers. Although both of those issues were extensively analyzed in this Court's recent ruling in *Morrison v. Olson*, ____ U.S.____, 108 S. Ct. 2597 (1988), the opinion below cites that decision only once and contains no discussion of it.

The district court first focused on the Appointments Clause in Article II, under which the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const., Art. II, § 2, cl. 2. Without explaining precisely how or why this language prohibits Congress from imposing general procedural requirements on the Justice Department's use of the ABA Committee, the court asserted that "the conclusion that the legislative branch cannot intervene in the Executive's selection process for judicial nominees springs directly from the *text* of the Constitution." App. 19a (emphasis added).

Second, the district court stated that, "because the Supreme Court has suggested that a more flexible, pragmatic approach be applied in analyzing separation of powers issues," it would also engage in a "balancing analysis" — assessing the degree to which the application of FACA would impair the President's nominating power, and then balancing that impairment against the congressional interests served by the Act. App. 19a.

With respect to the impairment side of the equation, the court, without even discussing how FACA's specific provisions would interfere with the nominating process, simply announced that the application of the Act to the ABA Committee creates a "significant potential for disruption of the President's constitutional prerogative . . .." App. 20a. Although the court stated that "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality," App. 21a, it did not explain why the Advisory Committee Act, which was carefully crafted to safeguard legitimate interests in confidentiality, would not adequately protect the work of the ABA Committee. The court acknowledged that even advisory committees dealing with "sensitive foreign policy or national security issues" have successfully complied with FACA's requirements, App. 24a, but it nonetheless concluded that the ABA Committee cannot be required to comply with the law because its mission involves "investigation of an individual's competence, integrity, and temperament." *Id.*

Having found a "potential for significant disruption" if FACA were applied to the Justice Department's use of the ABA Committee, the court proceeded to consider whether there is an "overriding congressional interest in application of FACA to the ABA Committee." App. 24a-25a. The court determined that there is no such interest for two interrelated reasons. First, Judge Green again stressed that the "only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function," and thus no other legitimate legislative objective — such as the public's interest in ensuring that the Justice Department uses the ABA Committee in accordance with the same rules and standards that are applied to all other advisory bodies — could be advanced through application of FACA to the Department's use of the Committee. App. 25a. Second, Judge Green found that even if "public accountability" is a legitimate congressional purpose, this objective is fully "satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information." *Id.* Accordingly, the district court concluded that no part of FACA can be constitutionally applied to the Justice Department's use of the ABA Committee. App. 26a.

THE QUESTION PRESENTED IS SUBSTANTIAL.

In declaring FACA unconstitutional as applied to the ABA Committee, the district court departed from separation of powers principles that have been laid down by this Court, and also ignored a fundamental rule of constitutional adjudication — that courts should refrain from "passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied . . .." *Watson v. Buck*, 313 U.S. 385, 402 (1941). As a consequence, the district court issued a decision that insulates an advisory body of paramount importance to the public from an entire regulatory scheme. Of even graver concern, the district court's ruling suggests, for the first time, that any activities touching in any manner on the President's nomination power are beyond the ability of Congress to regulate in any respect.[3]

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[3] If probable jurisdiction is noted, appellant will brief the statutory question resolved by the district court in its favor, as well as the constitutional question.

1. The District Court's Holding That FACA Is Unconstitutional As Applied To The ABA Committee Is Contrary To The Rulings Of This Court.

The district court's holding that the Appointments Clause prohibits the application of FACA to the ABA Committee has no grounding in the language of the Clause itself or in rulings of this Court. The relevant part of the Clause provides that the President "shall nominate . . . Officers of the United States," including federal judges, "by and with the Advice and Consent of the Senate . . .." U.S. Const., Art. II § 2, cl. 2. However, there is nothing in FACA's design or structure that deprives the President of his authority under the Clause or assigns to Congress any role whatsoever in the nomination process. To the contrary, as emphasized earlier, the statute's implementation is left entirely to the very executive branch officers who utilize the ABA Committee, which was a factor found to be of considerable importance in sustaining the statute at issue in *Nixon v. Administrator, GSA, supra*, 433 U.S. at 441. Accordingly, "this case simply does not pose a 'danger of congressional usurpation of Executive Branch functions.'" *Morrison v. Olson, supra*, 108 S. Ct. at 2620 (1988), *quoting Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

Nor, contrary to the district court's ruling, does FACA violate the separation of powers doctrine by " 'impermissibly undermin[ing]' the powers of the Executive Branch . . . or 'disrupt[ing] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions . . ..'" *Morrison v. Olson, supra*, 108 S. Ct. at 2621, *quoting Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986), and *Nixon v. Administrator, GSA, supra*, 433 U.S. at 443. Indeed, in contrast to *Morrison*, where it was "undeniable" that the independent counsel provisions of the Ethics in Government Act reduced the power of the Attorney General and the President to some degree, 108 S.Ct. at 2621, there is no basis for concluding that any of FACA's requirements will impair the Justice Department's utilization of the ABA Committee, let alone that *all* of them will invariably do so. Moreover, rather than focusing on those specific, threshold requirements of the statute that necessarily would be triggered by a finding that the Department's use of the Committee is subject to FACA, the district court instead considered provisions whose meaning, as applied to the ABA Committee, has not been defined by either the Justice Department or the courts, and whose potential for interference with the nominating process is, therefore, entirely speculative.

Thus, if the Committee is covered by FACA, only three things will definitely occur: (1) the Department will be required to prepare and file a charter for the Committee that will inform the public of the Department's position regarding the purpose, function, and method of operation of the Committee, 5 U.S.C. App. II § 9(c); (2) the Department will designate a committee management officer who will be responsible for maintaining the records of the Committee, attending Committee meetings, ensuring that accurate records are kept of the Committee's business, and supervising overall compliance with FACA, *id.* § 8; and (3) the Department will provide the public with advance notice of all meetings of the Committee, *id.* § 10(a). The Justice Department did not argue, and the district court did not hold, that these administrative requirements alone would impair the President's nominating authority. Indeed, any such claim would border on the frivolous in light of the fact that even an advisory body like the Tower Commission was able to comply with these requirements while conducting its extraordinarily sensitive investigation of the Iran-Contra affair. *See* 51 Fed. Reg. 43718 (Dec. 3, 1986).

Instead, in finding the entire Act unconstitutional as applied to the ABA Committee, the district court focused its dissatisfaction on the portions of FACA that provide for access to committee meetings and documents. Such a focus is misdirected for several reasons. First, as this Court noted in sustaining the Presidential Recordings and Materials Preservation Act, which provides for public access to some of former President Nixon's materials:

> Of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e.g., the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and a variety of other statutes. . . . Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy.

Nixon v. Administrator, GSA, 433 U.S. at 445-46. Moreover, just as the Materials Act authorizes the withholding from the public of materials that require confidentiality on privacy or other legitimate grounds, 44 U.S.C. § 2111 note §§ (b)(4), (5), so too does the Advisory Committee Act. Indeed, as noted earlier, the statute's exemptions parallel those contained in the Freedom of Information Act and Sunshine Act, two of the statutes which this Court cited with approval in *Nixon v. Administrator, GSA*. Most important of all, the district court did not even mention the statutory exemptions that could seemingly be used by the Justice Department to safeguard from public scrutiny the very kinds of meetings and documents that the court was concerned about — *i.e.*, those focusing on the "competence, integrity, and temperament" of individuals. App. 24a.

Thus, for example, it is apparent that the Justice Department could invoke FACA's personal privacy exemption as a

basis for maintaining the confidentiality of most, if not all, meetings and documents in which the credentials of individual candidates for federal judgeships are discussed. In fact, the district court even cited a Freedom of Information Act case, *Information Acquisition Corp. v. Department of Justice*, 3 GDS ¶ 83,149 (D.D.C. 1981), which squarely held that "documents collected by the FBI on a nominee for a federal judgeship" could be kept secret under the FOIA's privacy exemption "because release would have violated substantial privacy interests . . . ." App. 22a. Yet the court below offered no explanation as to why the same exemption in FACA would not be adequate to safeguard records and meetings relating to *potential* judicial nominees, who, if anything, would appear to have a greater privacy interest than actual nominees. Nor did the court reconcile its ruling with the fact that FACA's personal privacy exemption is routinely used by various agencies to withhold advisory committee materials focusing on the attributes and abilities of individuals. The National Science Foundation, for instance, employs this exemption to close the meetings and withhold the documents of dozens of peer review bodies that advise the agency whether individual scientists should receive federal funding. *See President's Sixteenth Annual Report on Federal Advisory Committees* at 9.[4]

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[4] The district court also failed to mention FACA's broad exemption for meetings that, if conducted in public, would be "likely to significantly frustrate implementation of a proposed . . . action." 5 U.S.C. § 552b(c)(9)(B). The only specific observation that the district court did make with respect to FACA's exemptions is that the statute does not appear to contain a general "deliberative process exemption" for advisory committee meetings and documents. App. 24a. However, the court never indicated why such an exemption is essential to the ABA Committee in light of the fact that hundreds of other advisory bodies have found the statute's other exemptions to be adequate. Indeed, since the ABA Committee's primary function — investigating and assessing the qualifications of individuals — directly implicates FACA's personal privacy exemption, the Committee would appear to be in far less need of a general deliberative process privilege than many, if not most, other advisory bodies.

Moreover, the district court not only failed to focus on FACA's actual exemptions, it also overlooked the fact that the determination whether to invoke one of the exemptions is committed to executive branch officials, and that any such determination bars public access unless it is challenged in court and overturned by a federal judge. Simply stated, the public could gain access to a specific meeting or document of the ABA Committee only if the Justice Department itself decided not to claim an exemption, or if a court rejected such a claim in a specific case.

Overall, therefore, rather than presume that FACA's various requirements and exemptions would be applied by the Justice Department and interpreted by future courts in a sensible manner, consistent with legitimate interests in privacy and confidentiality, the district court simply assumed that confidentiality could not be maintained. At bottom, the court failed to recognize that its "task is not to destroy the Act if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973).

Since there is no basis for concluding that the application of FACA to the ABA Committee will actually impair the Justice Department's ability to use the Committee, the district court should have rejected the Department's across-the-board constitutional assault without finding it necessary to scrutinize the specific congressional purposes served by the Act. *See Morrison v. Olson*, *supra*, 108 S. Ct. at 2621-22, *Nixon v. Administrator, GSA*, *supra*, 418 U.S. at 443 ("[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress"). But even if the interests advanced by FACA are needed to justify the statute's procedural requirements, the district court wrongly assumed that those interests are coterminous with the purposes served by the constitutional confirmation process, *i.e.*, allowing the Senate to pass on individual judicial nominees. FACA was not designed to assist the Senate in reviewing actual nominees for federal judgeships, but, rather, like such statutes as the FOIA and the Sunshine Act, it is a comprehensive, prophylactic measure that is intended to establish basic standards of accountability and openness for governmental advisory bodies, such as the ABA Committee, whose work has a significant effect on the public.

Here, for example, as in all situations where the executive branch relies heavily on the work of an advisory committee, the public has a strong interest in having the Justice Department file a charter describing the ABA Committee's precise function and role, as well as the general criteria and procedures that are used by the Committee in assessing prospective judicial nominees. And while meetings and documents discussing individual nominees may generally be closed to the public under FACA's exemptions, the public presumably would at least gain access to the Committee's general discussions of, for instance, the extent to which it should scrutinize the legal philosophy or political ideology of potential judicial candidates.

Likewise, the public could, as a result of the Justice Department's compliance with FACA, likely learn more about the procedures the Committee uses to investigate and evaluate judicial candidates, as well as such matters as the manner in which the Committee votes on ratings. The public's strong interest in learning about the overall functioning, role, and influence of the ABA Committee is precisely the kind of interest that impelled Congress to enact FACA. It is an interest that is not satisfied by the Senate's scrutiny of specific nominees, and neither the Justice Department nor the district court has offered any reason why it cannot or should not be furthered by applying FACA to the ABA Committee.

Finally, the fact that the Senate "has the opportunity to question a representative from the ABA Committee" during Senate confirmation hearings does not, as the district court seemed to believe, distinguish the ABA Committee from other executive advisory bodies. App. 25a. Many influential advisory committees — such as the Tower Commission, the Grace Commission, and the Rogers Commission on the Challenger disaster, to name just a few — have been called on by both Houses of Congress to explain their views and recommendations. Thus, if, as the district court ruled, Congress' "opportunity to question a representative" of an advisory committee is sufficient to establish the lack of a legislative interest served by FACA, App. 25a, then the court's decision necessarily calls into question FACA's constitutionality as applied to many other important advisory bodies.

2. The District Court's Ruling Suggests For The First Time That All Aspects Of The Nomination Process Are Entirely Immune From Any Legislative Controls.

An even more troubling aspect of the district court's opinion is its suggestion that, because the Senate is given an express role in the appointments process, *i.e.*, the advice and consent function, Congress has no power to enact a general regulatory scheme that indirectly affects that process. App. 19a. This approach threatens to insulate all matters in any way related to the nomination process (and, presumably, the treaty-making process, which is also subject to Senate approval) from general legislative regulation, and is inconsistent with the reasoning of this Court in *Morrison v. Olson*, *Nixon v. Administrator, GSA*, and other separation of powers cases.

In *Morrison*, the Court rejected the Justice Department's argument that Congress is prohibited from enacting any laws bearing on the prosecution power simply because the President is assigned the responsibility to "take care that the laws be faithfully executed." U.S. Const., Art. II, § 3. In other words, the Court found that there was no separation of powers problem despite the fact that the Constitution does not explicitly give Congress any role in ensuring that the laws are faithfully executed. Similarly, Congress has no express constitutional function in preserving and providing public access to the materials of former Presidents, yet that did not lead this Court to strike down the Materials Act as unconstitutional in *Nixon*. If Congress can enact statutes bearing on matters on which the Constitution is silent with respect to Congress' role — as the Court ruled in *Morrison* and *Nixon* — then it can surely enact general laws (such as FACA) that may indirectly bear on a power, *i.e.*, appointments, in which the Senate is given an explicit responsibility. Strangely, under the district court's decision, the greater the effort made by the Framers to assure a congressional role in a particular matter, the less power Congress has to apply a general regulatory scheme to that matter.[5]

By interpreting the Senate's advice and consent power as a limitation on Congress' authority to legislate, the district

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[5] The anomalous situation created by the district court's decision can best be illustrated by comparing the ABA Committee to the many committees that are routinely established by executive branch departments and agencies to advise them on how to implement various federal laws. In Fiscal Year 1987 alone, there were over 350 advisory committees created by executive agencies to assist them in "tak[ing] care that the laws be faithfully executed." U.S. Const., Art. II, § 3; *see Sixteenth Annual Report of the President on Federal Advisory Committees*, at 9. If Congress may constitutionally apply FACA's requirements to these committees, despite the fact that Congress has no express constitutional role in regulating the execution of the laws, then it is difficult to comprehend why Congress cannot apply the statute to the ABA Committee, which directly affects the Senate's performance of its advice and consent function.

court's decision necessarily calls into question the constitutionality of a host of statutory schemes that impact on the nomination process. For example, the D.C. Circuit has held that the Freedom of Information Act applies to questionnaire responses obtained by the Department of Justice from Senators, explaining the Senators' procedures for selecting and recommending potential judicial nominees. *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). The court unanimously rejected the Justice Department's argument that the responses should not be subject to the FOIA because the "nomination of judges is a purely presidential function . . . and . . . the President's choice to draw the Attorney General into this presidential activity should not make the responses disclosable." *Id.* at 788. Instead, Judge Malcolm Wilkey's opinion reasoned that

> clearing names of judicial nominees has long been a routine function of the Department of Justice. . . Judicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President. . . This does not appear as either a realistic or intended distinction under the Freedom of Information Act.

Id. at 787. In stark contrast, however, the district court's reasoning leads to the conclusion that the Freedom of Information Act cannot constitutionally be applied to the questionnaires at issue in *Ryan* or, for that matter, to *any* documents linked to the nomination process, whether they be in the possession of the Justice Department, the Federal Bureau of Investigation, or another federal agency covered by the FOIA.

The district court's decision also necessarily calls into question whether the various requirements and restrictions of the Privacy Act, 5 U.S.C. § 552a, may constitutionally be applied

to materials regarding prospective judicial nominees. If "the legislative branch cannot intervene" in the nomination process in any fashion, as the district court ruled (App. 19a), then Congress cannot require the Department to maintain information regarding individuals under investigation "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness," *id.* § (e)(5), or afford such individuals civil remedies, including the right to seek amendment of inaccurate records, if these or other safeguards of the Privacy Act are violated by Justice Department employees. *Id.* § (g).

In sum, the district court's ruling not only invalidates the application of a significant statutory scheme to an important advisory committee, but it also raises doubts about the constitutionality of other general statutes that bear, either directly or indirectly, on the nomination process. Therefore, the district court's ruling raises a substantial question that requires plenary review by this Court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION,)
Plaintiff,)
and)
PUBLIC CITIZEN,)
Plaintiff-Intervenor,)
)
)
v.)
UNITED STATES DEPARTMENT OF)
JUSTICE,)
Defendant.)

District of Columbia
Civil Action No. 86-2883

FILED
Aug 4 1988
Clerk, U.S. District
Court

MEMORANDUM OPINION

Plaintiff Washington Legal Foundation and plaintiff-intervenor Public Citizen[1] bring this action against the United States Department of Justice ("DOJ")[2] seeking declaratory relief that the agency's use of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee" or "Committee") for the evaluations of the qualifications of nominees for federal judgeships violates the Federal Advisory Committee Act ("FACA" or "Act"), 5 U.S.C. App. II.[3] Plaintiffs request that, should DOJ continue to solicit advice from the ABA Committee, the agency be enjoined to comply with the Act's requirements,[4] such as filing an advisory committee charter, 5 U.S.C. App. II, § 9(c), providing advance public notice of Committee meetings, *id.* § 10(a)(2), opening meetings to the public, *id.* § 10(a)(1), assigning a federal official to attend all meetings, *id.* § 10(e), maintaining and providing public access to the Committee's records, *id.* § § 8(b), 10(b), and having a "fairly balanced" membership in terms of points of view represented and functions to be performed.[5] The matter now comes before the Court on the parties'

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[1] Plaintiff Washington Legal Foundation ("WLF") and plaintiff-intervenor Public Citizen will be referred to herein as "plaintiffs," except as otherwise noted.

[2] Plaintiff WLF's earlier action brought against only the American Bar Association Standing Committee on Federal Judiciary and its individual members, ***Washington Legal Found. v. American Bar Ass'n Standing Comm. on Federal Judiciary***, 648 F. Supp. 1353, 1359 (D.D.C. 1986) ("WLF"), was dismissed shortly after this second action was filed because "the proper defendant in a suit brought to enforce the [Federal Advisory Committee Act ("FACA")] is the government, not the advisory committee 'utilized' by the government." This Court emphasized in that Opinion, however, that it was not determining the merits of the issue now before the Court, *i.e.*, whether the ABA Committee is encompassed by FACA's definition of "advisory committee." *Id.* at 1359 n.4.

motions for summary judgment.[6]

The primary questions presented by this case are two-fold:

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[3] Plaintiff WLF also requests in its complaint that this Court declare that DOJ's utilization of the ABA Committee violates the Administrative Procedures Act, 5 U.S.C. § 706, but this issue has nowhere been raised separately in the motions. It is, therefore, not addressed here.

[4] In addition, WLF asks this Court to order DOJ to assemble and provide plaintiff information that WLF has requested in the past, such as names of potential nominees. *See* Complaint, ¶¶ 16, 17. WLF has not provided any support for its claim, and as retrospective relief, it is presumptively inappropriate under FACA. The proper remedy for violation of FACA is a prospective injunction, *i.e.*, an order requiring the government either to cease its undertakings with the advisory committee or to ensure that the advisory committee is brought into compliance with the Act. *WLF*, 648 F. Supp. at 1360; *see also Food Chemical News, Inc., v. Davis*, 378 F. Supp. 1048, 1049 (D.D.C. 1974).

[5] Although "balanced membership" is a requirement for committees "established" under FACA, it is unclear whether it also applies to groups such as the ABA Committee that are not established but only "utilized" within the meaning of Section 3(2). *See* discussion *infra* Section II(A). Perhaps out of an abundance of caution, defendant has conditionally addressed the issue, noting that the provision "arguably applies." After examining plaintiffs' complaints, the statute, and the regulations promulgated thereunder, however, the Court concludes that, even were FACA found applicable, balanced committee membership may not necessarily be required.

The balanced membership requirement is contained in the section of FACA that applies only to committees "established" by agencies or the President. 5 U.S.C. App. II, § 5(b)(2), (c). The regulations promulgated by the General Services Administration ("GSA") on balanced membership do not make clear whether GSA believes that these provisions would also apply to "utilized" committees. 41 C.F.R. § 101-6.1002. Although the requirement has been held to apply to committees established by the President, as well as by legislation, *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983), no court has expressly addressed the issue of whether it applies to groups only "utilized" but not "established" under FACA. *See National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979); *See also Center for Auto Safety v. Cox*, 580 F.2d 689, 693-94 (D.C. Cir. 1978). That plaintiffs have not pressed the issue in this case may reflect the uncertainty of the sparse law in this area.

In the earlier case, plaintiff WLF vigorously contended that FACA requires the ABA committee to have a fairly balanced membership. Complaint, Civil Action No. 85-3918, ¶ 1. WLF argued that the Committee's investigations "have been conducted . . . in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or present their nomination by the President." Complaint, *id*, ¶ 26. WLF also asserted that the ABA Committee consulted on a regular basis with "liberal" and "left-wing" political organizations to the exclusion of conservative organizations. *Id.* ¶ 25 (Notably, the ABA committee's practice of consulting with the Judicial Selection Project, which sought to represent minority and women's groups interested in the selection process, was discontinued in 1985 because the Committee determined that the practice was "inconsistent with its concerns for confidentiality and obligations to the President." *Id.* at Exhibit F.) The ABA Committee has indeed been criticized for being "too conservative," but also for being "to liberal." Answer, Civil Action No. 85-3918, ¶ 25.

No such allegations of political imbalance are raised by WLF in this case. Indeed, WLF now states that "the balanced membership requirement of Section 5 of FACA . . . is not an issue in this case." WLF's Opposition to Defendant's Motion to Dismiss ("WLF Opp.") at 22; *see also id.* at 35 ("plaintiff makes no challenge as to the President's selection or choice of members on the committee"). Accordingly, for these reasons, and because of the final ruling in this case, the Court declines to comment further on this issue.

[6] Defendant originally filed a motion to dismiss, but then suggested that its motion should be converted, for the Court's convenience, to a motion

(1) is the ABA Committee an advisory committee under FACA? and (2) would application of FACA to the ABA Committee violate the constitutional principle of separation of powers? For the reasons set forth below, the Court finds that the ABA Committee is an advisory committee "utilized" by DOJ within the meaning of FACA, 5 U.S.C. App. II, § 3(2), but that FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA to the ABA Committee has been demonstrated.

I. Factual Background

In selecting individuals to nominate for federal judgeships, the President considers numerous sources of information and advice, including that of private citizens, public officials, and government agencies.[7] At issue in this case is the information provided to the President by the fourteen-member ABA Standing Committee on Federal Judiciary,[8] one of the several working committees of the 328,000-member American Bar

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for summary judgment in light of Public Citizen's motion for summary judgment. Defendant's Opposition to Plaintiff-Intervenor's Motion for Summary Judgment and Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Def. Opp.") at 6 n.3. All the parties have since filed statements of material facts, and plaintiff WLF has filed an "alternative" motion for summary judgment. Accordingly, the Court shall treat the issues presented in accordance with the standards for summary judgment. Fed. R. Civ. P. 56; ***Anderson v. Liberty Lobby***, 106 S. Ct. 2505, 2511 (1986); ***Celotex Corp. v. Catrett***, 106 S. Ct. 2548, 2553 (1986).

[7] Declaration of Steve A. Mathews, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice ("Mathews Decl."), ¶ 2.

[8] American Bar Association, ***Standing Committee on Federal Judiciary: What It Is and How It Works*** ("ABA, ***Standing Committee***") at 1.

Association and a private entity not financially supported by any federal agency.[9] The ABA Committee submits its evaluation and rating of nominees to the Attorney General, who in conjunction with the President's federal judicial selection committee,[10] gathers information and makes recommendations to the President concerning the qualifications of individuals who may be considered for nomination and appointment.[11]

At the direction of the President's federal judicial selection committee, DOJ commences the review process by requesting the ABA Committee to investigate and evaluate potential candidates' professional qualifications and to provide a formal report to the Assistant Attorney General.[12] DOJ does not provide the names of political nominees to any other non-governmental entities for evaluation.[13] DOJ notifies candidates of their selection for possible nomination, requests candidates to complete a Personal Data Questionnaire designed by the ABA,[14] and directs them to provide the information requested on that questionnaire to the Chair of the ABA Committee, to the Committee's representative for the relevant federal circuit, and to the Assistant Attorney General, Office of Legal Policy.[15] The Committee's review process has

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[9] *WLF*, 648 F. Supp. at 1354; Mathews Decl. ¶ 5; Answer, Civil Action 85-3918, ¶ 19.

[10] The President's federal judicial selection committee is comprised of immediate advisors to the President, including the: Counsel, Deputy Counsel, and Associate Counsel to the President; the Assistant to the President for Political and Intergovernmental Affairs; the Assistant to the President for Legislative Affairs; the Director of Presidential Personnel; the Attorney General; Deputy Attorney General; Counselor to the Attorney General; and the Assistant Attorney General and Deputy Assistant Attorney General, Office of Legal Policy. Mathews Decl. ¶ 7.

[11] *Id.* ¶ 3.

[12] *Id.* ¶ 8.

[13] WLF's Statement of Material Facts, ¶¶ 2, 3; Public Citizen's Statement of Material Facts, ¶¶ 2, 3; Defendant's Response to WLF's Statement of Material Facts, ¶¶ 2,3.

[14] Defendant's Response to WLF's Statement of Material Facts, ¶ 4.

> traditionally involved confidential interviews with lawyers, judges, and professors in the nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications. All details of the review process and the identity of those asked to discuss a nominee's qualifications are kept confidential by the ABA.[16]

Upon completion of the investigation, a report is prepared and circulated to the full ABA Committee, which then together determines a final qualifications rating—either "exceptionally well qualified," "well qualified," "qualified," or "not qualified."[17] This one- or two-sentence rating[18] is forwarded to DOJ, accompanied by an indication of whether it is supported by a majority or substantial majority of the Committee, or unanimously.[19] The rating and the report remain confidential.[20]

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[15] Mathews Decl. ¶ 8.

[16] *WLF*, 648 F. Supp. at 1355.

[17] *Id.*

[18] Answer, Civil Action No. 85-3918, ¶ 33.

[19] Mathews Decl. ¶ 10.

[20] *WLF*, 648 F. Supp. at 1355. The reasons for the ABA Committee's rating of a potential nominee are, however, "sometimes" revealed to DOJ, and after the individual is nominated, are "sometimes" revealed to the Senate Judiciary Committee. Defendant's Response to WLF's Statement of Material Facts, ¶ 9. But, the identities of the ABA Committee's sources and its internal reports remain confidential. *Id.*

The prospective nominee's name, of course, does not often remain a secret from the public. In the course of the ABA Committee's extensive investigation and consultation with hundreds of individuals and several organizations, public identification of the prospective nominee is "inevitable." ABA, *Standing Committee*, at 9. The ABA Committee observes, however, that such public knowledge "may be beneficial in some circumstances in that it encourages investigation into the background and personal history of the prospective nominees by other persons." *Id.*

The Committee's rating, along with other information such as the Federal Bureau of Investigation reports, the candidate's financial declaration, and medical background, is then considered by the Attorney General in making a recommendation to the President.[21]

After the President announces the nomination, the ABA Committee rating is publicly disclosed during the confirmation hearings conducted by the Senate Judiciary Committee.[22]

II. Discussion

A. Is the ABA Committee an Advisory Committee under FACA?

In determining whether the ABA Standing Committee on Federal Judiciary is an advisory committee under FACA, the Court first turns to the plain language of the statute. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Kosak v. United States*, 465 U.S. 848, 853 (1984). FACA defines an "advisory committee" as

> any committee, board, commission, council, conference, panel, task force, or other similar group . . . which is . . .
>
> (B) established or *utilized* by the President, or
>
> (C) established or *utilized* by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government . . .

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[21] Mathews Decl. ¶¶ 4, 11; Defendant's Response to WLF's Statement of Material Facts, ¶ 6; WLF's Statement of Material Facts, ¶ 6; ABA, *Standing Committee*, at 7.

[22] *See* Defendant's Response to Plaintiffs' Statement of Material Facts, ¶ 8.

5 U.S.C. App. II, § 3(2) (emphasis added). Since there is no contention here that the ABA Committee was "established" by the President or a federal agency, the Court proceeds to examine whether DOJ has "utilized" the ABA Committee within the meaning of Section 3(2).

Interpreting the term "utilization" is not as complicated a task as defendant suggests. The common-sense meaning of "utilized" is "to make use of." *Webster's Third New International Dictionary* (1963). The facts outlined above and discussed further below easily support the conclusion that DOJ "makes use of" the ABA Committee by directly and preferentially soliciting its assistance and recommendation on judicial nominees. Although reliance on the plain language of FACA alone is not entirely satisfactory because FACA "contains a very broad, imprecise definition, and in this respect is not a model of draftmanship," *Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975); *see also Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), *remanded on other grounds*, 580 F.2d 689 (D.C. Cir. 1978), the statute's legislative history, while not greatly illuminating, *Consumers Union of the United States, Inc. v. Department of Health, Education, and Welfare*, 409 F. Supp. 473, 475 (D.D.C. 1976), *aff'd* 551 F.2d 466 (D.C. Cir. 1977), also supports a liberal interpretation of the term "utilized." *Lombardo v. Handler*, 397 F. Supp. 792, 797-800 (D.C. Cir. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977); *Center for Auto Safety*, 414 F. Supp. at 223 (citing S. Rep. No. 92-1098, 92d Cong., 2d Sess. 8 (1972) ("the words 'established' and 'organized' should be interpreted in their most liberal sense'") and H.R. Rep. No. 92-1017, 92d Cong., 2d Sess. 4 (1972)).

The regulations promulgated under FACA by the General Services Administration ("GSA"), 5 U.S.C. App. II, § 7(c), further support the conclusion that DOJ has "utilized" the ABA Committee as an advisory committee. According to GSA, a committee "utilized" under FACA is

> a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the Federal Government which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

41 C.F.R. § 101-6.1003 (emphasis added).

The ABA Committee fits squarely within this definition. The Committee's historically lengthy, direct, and significant relationship with DOJ in the evaluation process has clearly made it a preferred source of advice in the nomination process. While, as defendant suggests, no evidence in the legislative history of FACA has surfaced to show that Congress intended that the Act would apply specifically to the ABA Committee,[23] the undisputed facts regarding DOJ's relationship with

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[23] Defendant suggests that through the several years in which Congress has received advice from the ABA Committee, "[t]here has not been any indication whatsoever that it intended the FACA to apply to the Committee." Def. Opp. at 15. Defendant's citations to discussions in the Congressional Record, however, simply do not address this issue, *see* 132 Cong. Rec. S8562-83 (daily ed. June 26, 1986) (remarks of Sen. Thurmond), 132 Cong. Rec. S8476-78 (daily ed. June 25, 1986) (remarks of Sen. Hatch) (discussing nomination of Daniel A. Manion to the Seventh Circuit Court of Appeals), and notably defendant has not pointed to any indication that Congress intended *to exempt* the ABA Committee from FACA. As Public Citizen points out, it is not surprising that only a few such advisory committees are mentioned in the legislative history of FACA as over 2600 formal interagency and advisory committees existed at the time FACA was enacted. Public Citizen's Motion for Summary Judgement, at 7 n.1.

the ABA Committee readily support the conclusion that the Committee falls with Congress' definition of advisory committee.

Since 1952, DOJ has directly solicited from the ABA Committee its evaluation of and recommendation on federal judicial nominees. Defendant concedes that the ABA Committee is "one historically utilized, important source of advice in this area" and its "evaluations of candidates are an integral and important part of the nomination process."[24] The relationship between DOJ and the ABA Committee is mutual, direct, and to a large part exclusive.[25] Nominees are directed by DOJ to submit personal information on an ABA-designed questionnaire directly to the ABA Committee. Further, the ABA Committee is the only non-governmental entity routinely provided the names of potential nominees by DOJ in advance of public announcement.[26] And, in return, the ABA provides its recommendation and report confidentially only to the DOJ and, only later, publicly to the Senate. DOJ highly values the ABA Committee's evaluation and rating, even though DOJ and the President do not always agree with the ABA Committee's assessment of the nominee's qualifications.[27] Moreover, the ABA Committee is a formal committee, with a clearly defined structure, singular purpose, and apparently only two "clients"—

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[24] *See* Def. Opp. at 1; *id.* at 30 n.27.

[25] *See National Nutritional Foods v. Califano*, 603 F.2d 327, 336 n.10 (2d Cir. 1979).

[26] *See Center for Auto Safety v. Tiemann*, 580 F.2d 689, 694 (D.C. Cir. 1978) (agency disclosed proposed regulations to select groups).

[27] The weight given to a group's recommendation is one factor to be considered in determining whether the group is utilized within the meaning of Section 3(2). *National Nutritional Foods*, 603 F.2d at 336 ("One factor weighing heavily with us is that the Commissioner leaned so strongly on the advisory group in his press release and, even more so, in his proposed regulation.")

the Attorney General and the Senate Judiciary Committee.[28] The ABA Committee is not merely a group of casually associated individuals who are consulted singly;[29] it self-consciously and purposefully acts "as a committee."[30] The ABA Committee is thus a traditionally, routinely, and preferentially utilized source of advice for DOJ and the President[31] on potential nominees for federal judgeships.

Defendant argues, nonetheless, that this Court should not interpret FACA to apply to the ABA Committee because to do so would be incongruous with congressional intent. According to DOJ, "the fundamental purpose of FACA was to control private special interests' groups excessive influence over federal agencies with regulatory authority or control over matters of direct concern to those groups,"[32] and since the ABA Committee is not a special interest group, it should not be subject to FACA. This argument is unpersuasive. Though Congress may have been particularly motivated to shine the public light on agency relationships with special interest or regulated groups, defendant has not demonstrated that the legislative history, language of the statute, the regulations, or caselaw support such a distinction in the application of FACA. To the contrary, these sources reveal that Congress' purpose was much broader.

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[28] *See Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.C. Cir. 1975).

[29] *Cf. Natural Resources Defense Council, Inc. v. Herrington*, 637 F. Supp. 116, 119 (D.D.C. 1986) (held six-member panel of private experts who were to work independently and alone were not subject to FACA).

[30] *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on the Judiciary of the United States Senate*, 100th Cong., 1st Sess. 938 (1987) ("*Bork Hearings*") (remarks of Judge Harold R. Tyler, Jr., Chair, ABA Committee); *Transcript of Proceedings, Nomination of Anthony M. Kennedy to be an Associate Justice of the Supreme Court, Hearings Before the Committee on the Judiciary of the United States Senate* 28 (Dec. 16, 1987) ("*Kennedy Hearings*") (remarks of Judge Tyler).

[31] That the Attorney General acts as an intermediary between the ABA Committee and the President does not significantly alter the constitutional analysis. The nomination prerogative is clearly committed to the President and not the agency under the Constitution. The President has partially delegated this responsibility to amass, collate, and analyze information from various sources and in consultation with others (including the President) to DOJ. Notably, the President's federal judicial selection committee is composed of *both* DOJ officials and members of the President's staff. *See supra* note 10. In the end, of course, it is the President, vested by the Constitution with the power of appointment, who makes the nomination.

Enacted by Congress in 1972, FACA expressly recognizes that advisory bodies "in the executive branch of the Federal Government . . . are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions." 5 U.S.C. App. II § 2(a); *see also* S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972), H.R. Rep. No. 92-1017, 92d Cong., 2d Sess. 1 (1972) (both reports setting forth purpose of FACA and emphasizing public access to agency decisionmaking process without mentioning special interest groups).[33] The central purpose of FACA is quite general: "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups." ***Washington Legal Foundation v. American Bar Ass'n***, 648 F. Supp. 1353, 1358 (D.D.C. 1986) ("*WLF*") (quoting ***HLI Lordship Indus., Inc. v. Committee for Purchase From the Blind***, 615 F. Supp. 970, 978 (E.D. Va. 1985), ***reversed on other grounds***, 791 F.2d 1136 (4th Cir. 1986)); ***see also Food Chemical News, Inc., v. Davis***, 378 F. Supp. 1048, 1051 (D.D.C. 1974).

FACA itself mentions few exceptions based on the nature of the organization giving the advice. The statute specifically excludes from its coverage only groups established or utilized by the Central Intelligence Agency, the Federal Reserve System, and "any *local* civic groups whose primary function is that of rendering a public service with respect to a Federal program." 5 U.S.C. App. II, § 4(c) (emphasis added).

GSA's regulatory interpretation of FACA confirms that groups like the ABA Committee were not intended to be excluded from FACA. The GSA regulations set forth several specific examples of types of advisory committees exempt from the Act, 41 C.F.R. § 101-6.1004, none of which apply to the ABA Committee. Indeed, several mention by implication certain characteristics of the ABA Committee that bring it within the Act's purview.[34]

While the courts have considered a group's self-interest in the agency's decision a factor supporting application of FACA,

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[32] Def. Opp. at 13. In response, WLF asserts that the ABA is "nothing more than a special interest group which, on behalf of less than half the lawyers in America, lobbies for its point of view before the Congress, the agencies, and courts of law," WLF Opp., at 14, but fails to allege that the ABA Committee should be considered a special interest group with respect to the process for nominating federal judges. The record indicates that such an argument would, indeed, be difficult to prove.

[33] *See* H.R. Rep. No. 92-1016, 92d Cong., 2d Sess. 6 (1972) ("*One* of the dangers of unregulated use of advisory committees is that special interest groups may use their memberships on such bodies to promote their private concerns.") (emphasis added).

[34] *See, e.g.*, 41 C.F.R. § 101-6.1004(f) (exempting "local" civic groups rendering a public service; implying that national or federal groups of such nature are not exempt); *id.* § 101-6.1004(h)(2) (exempting meetings initiated by a group for the purpose of expressing that group's view, provided that the group is not used as a "preferred source of advice or recommendation"; implying that where agency initiates contact, and group is a preferred source, the group falls within FACA); *id.* § 101-6.1004(i) (exempting "advisory" function; implying that committee like ABA Committee, whose primary function is advisory, is covered by FACA); and *id.* § 1016.1004(j) (exempting meetings for purpose of obtaining advice of individual attendees and not for purpose of obtaining group consensus; implying that advice provided expressly by a committee such as the ABA Committee is under FACA).

see, e.g., *Center for Auto Safety*, 414 F. Supp. at 225 (association of state highway and transportation officials); *Food Chemical News*, 378 F. Supp. at 1051-52 (consumer and distilled spirits industry representatives), none have held that an advisory group's civic, benign, or neutral motives place it beyond the statute's reach. *See Natural Resources Defense Council, Inc. v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986) (emphasizing that advisory panel was not composed of special interest representatives but deciding case on grounds that panel was to provide advice individually and not as a committee); *see also National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 334-36 (2d Cir. 1979) (leading experts on obesity control). Thus, regardless of whether the ABA Committee is considered a "special interest" group, it is under FACA's definition of advisory committee.

Although cognizant of its duty to "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," *WLF*, 648 F. Supp. at 1357 (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961)), a court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)); *see also Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3255 (1986). In this case, the Court finds that the plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all support the conclusion that the ABA Committee falls within FACA's definition of advisory committee. The constitutional issue here cannot fairly be avoided.

B. Does Application of FACA to the ABA Committee Violate the Constitutional Principle of Separation of Powers?

The very breadth of the language in FACA that compels the conclusion that the ABA Committee is subject to that Act concomitantly opens this application to constitutional question.[35] As this Court noted in *WLF*, the ABA Committee "raised serious questions about the constitutionality of the plaintiff's proposed application of FACA."[36] It is important to focus on the specific constitutional prerogative that defendant contends will be trampled were FACA to be invoked—the President's power of appointment.

Article II, § 2, cl. 2, of the Constitution provides that

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

The President's constitutionality assigned role is thus to nominate federal judges, and the function of the Senate is to provide advice and consent. While the Court does not adopt defendant's view that general principles of separation of powers preclude the application of FACA to the nomination process,[37] the Court is nonetheless persuaded for reasons explained below that Congress cannot impose FACA in this case because of the specific limitations on the role of the legislature as expressed in Article II and because no overriding congressional interest has been demonstrated that outweighs FACA's intrusion on the nomination power of the President.

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[35] *See National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C. 1983), *aff'd*, 711 F.2d 1071 (1983) (the language of FACA is "obscure, imprecise, and open to interpretations so broad that in the present context at least it would threaten to impinge unduly on prerogatives preserved by the separation of powers doctrine").

[36] *WLF*, 648 F. Supp. at 1356.

1. The Role of Congress in the Nomination and Appointment Process

In the *Federalist Papers*, No. 76, Alexander Hamilton articulated the argument for separating the roles of the President and the Senate in the nomination and appointment of federal judges:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled . . . .
>
> . . . .
>
> In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment.
>
> . . . .
>
> To what purpose, then, require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and tend greatly to prevent the appointment of unfit characters from State prejudice, from family connections, from personal attachment, or from a view of popularity.

Id. at 506-09.[38] This specific fundamental distinction between the branches in the nomination process has not since been eroded or blurred.[39]

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[37] Defendant argues at length that Congress can almost never interfere with the affairs of the Executive because the three branches of government must be kept entirely separate. This argument goes too far and has, not surprisingly, been rejected by the courts.

As the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), although the Framers intended "that the powers of the three great branches of the National Government be largely separate from one another . . . it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of these three essential branches of Government." *Id.* at 120-21. The Supreme Court has indeed, "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Administrator, General Services*, 433 U.S. 425, 443 (1977). Rather, the Court has embraced the view expressed in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), that "the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *United States v. Nixon*, 418 U.S. 683, 707 (1974). The notion forwarded by DOJ that separation of powers requires "three airtight departments" of government is indeed "archaic." *Nixon*, 433 U.S. at 443. *See also Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 935 (D.C. Cir. 1982) (rejecting agency's contention that separation of powers principles prevent imposition of Sunshine Act on commission meetings)

[38] *See also* IX *Works of John Adams* 634 (1854 ed.) (the President "ought to select the [candidates] best qualified and most meritorious for offices . . . without being shackled by any check by law, constitution or institution. Without this unrestrained liberty, he is not a check upon the legislative power nor either branch of it.").

[39] *See, e.g.*, Omnibus Judgeships Act of 1978, P.L. 95-486, 92 Stat. 1629, 1633 (1978) (providing that no judicial nomination may be invalidated if the President fails to select a candidate based on nonbinding selection criteria); H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978).

This exclusiveness of the President's prerogative in this area is democratically tolerable (even, according to Hamilton, desirable or necessary) because of the checking function performed by the Senate. As former Senator Charles McC. Mathias, Jr. has commented: "Only with vigorous review can the Senate carry out the role envisioned for it by the framers of the Constitution—to provide a 'salutary restraint' upon executive power . . . ."[40] Through the confirmation process, the public, individuals, and interested organizations alike have an opportunity to inform the decisionmaking process and scrutinize the President's nominee.

The ABA Committee has played an important role in the Senate confirmation process.[41] Like DOJ, the Senate Judiciary Committee has, since 1948,[42] directly solicited and highly valued the advice of the ABA Committee in considering nominees for federal judgeships. At the request of the Senate Judiciary Committee, a spokesperson for the ABA Committee appears at the hearings and reports on the reasons underlying the rating it has given to the nominee.[43] The ABA Committee may also submit a follow-up report to the Senate if new information develops that "warrants comment or evaluation."[44] Recent hearings on nominees for the Supreme Court confirm that the Senate Judiciary Committee highly respects and values the advice of the ABA Committee, though, at the same time, some Senators have questioned the Committee's

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[40] Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 Chic. L. R. 200, 207 (1987).

[41] *Id.* at 203.

[42] ABA, *Standing Committee*, at 1.

[43] *Id.* at 9.

[44] *Id.*

methods and ideological neutrality,[45] and have suggested that undue weight is given to the Committee's rating.[46]

In short, the conclusion that the legislative branch cannot intervene in the Executive's selection process for judicial nominees springs directly from the text of the Constitution. Of additional importance in this case is that public scrutiny of the role of the ABA Committee, serving purposes similar if not identical to that of FACA, is already assured through the Senate's power of advice and consent. This alone would warrant the conclusion that FACA cannot constitutionally be applied to DOJ's utilization of the ABA Committee. But, because the Supreme Court has suggested that a more flexible, pragmatic approach be applied in analyzing separation of powers issues, that balancing analysis is now addressed. Here, again, however, plaintiffs' arguments prove unavailing.

2. Nixon Balancing Analysis

In *Nixon v. Administrator, General Services*, 433 U.S. 425 (1977), the Supreme Court held that

> in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nix-*

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[45] *See, e.g., Bork Hearings*, at 907-08.

[46] *See Bork Hearings*, at 943, (remarks of Sen. Humphrey: "The ABA is taken very seriously, perhaps too seriously by the public, and the Senate, in its evaluation . . . . "); *Kennedy Hearings*, at 46 (remarks of Sen. Simpson: "somehow the American Bar has become a bigger player that they should be here. . . . We do not have a hearing until we know where you are. We do not proceed until we have had the word from the ABA, and I do not think that it's right. . . . Maybe that is our fault. Maybe we have done that. I think it probably is.").

> *on*, 418 U.S., at 711-12. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id. at 443; *see also Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 935 (D.C. Cir. 1982) (applying *Nixon* balancing analysis to application of Sunshine Act and rejecting defendant's strict separation of powers argument).

Applying this functional test here, the Court finds there is indeed obvious and significant potential for "disruption" of the President's constitutional prerogative during the nomination process; this impact has not been demonstrably justified by any overriding congressional need to apply FACA.[47]

Defendant suggests that "the FACA open meeting and records provisions, which are at the very heart of the Act, would severely intrude upon the President's interest in obtaining confidential, candid and timely advice concerning the qualifications of potential nominees for the federal courts."[48] The Court agrees, at minimum, that the application of FACA to the ABA Committee would potentially inhibit the President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process.

The Court does not doubt that application of FACA to the ABA Committee will discourage DOJ from consulting the ABA

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[47] WLF itself concedes that Congress has "a constitutional and legislative interest in legislating in this area *so long as that legislation does not significantly encroach on the Executive*." WLF Opp. at 31 (emphasis added).

[48] Def. Opp. at 28.

Committee or, alternatively, will discourage that Committee from continuing to perform the service of investigating and evaluating potential federal judicial nominees. As discussed above, for thirty-six years, through significant and numerous changes of Executive stewardship, DOJ has steadfastly relied on the ABA Committee to undertake a thorough investigation and evaluation of the professional qualifications of potential nominees for federal judgeships. The hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality.[49] The ABA Committee has found in its experience that "only be assessing and maintaining such confidentiality can sources be persuaded to provide full and candid information."[50] The ABA Committee also places a high value on confidentiality out of respect for the Presidential prerogative in the nomination process. As the Committee itself has observed: "Public disclosure of the Committee's evaluation prior to its report to the Senate Judiciary Committee after the nomination has been made is more serious. The nomination process is a Presidential function and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination."[51]

The importance of confidentiality of communications and deliberations in the exercise of executive functions is well-recognized by the courts. The Supreme Court noted in *United States v. Nixon*, 418 U.S. 683 (1973), that there is a

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[49] ABA, *Standing Committee*, at 5 (interview with judges, lawyers, and law professors are confidential); *id.* at 6 (in forwarding report to Attorney General, ABA Committee protects confidentially reported to those interviewed); *id.* at 7 (rating is confidentially reported to the Attorney General); *id.* at 7 (ABA Committee does not make rating public prior to Senate confirmation process unless authorized to do so by the Attorney General); *id.* at 9 ("A persistent concern of the Committee in connection with its investigation of prospective nominees is confidentiality.").

[50] *Id.* at 10.

[51] *Id.* at 9-10.

> valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearance and for their own interests to the detriment of the decisionmaking process.

Id. at 705. Even though the *Nixon* Court found that a subpoena issued against President Nixon was enforceable on the basis that the general presumptive privilege for Presidential communications was outweighed by the public interest in fair administration of criminal justice, the Court expressly recognized the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708; *see also Ryan v. Department of Justice*, 617 F.2d 781, 789-91 (D.C. Cir. 1980) (acknowledging agency need as expressed in FOIA Exemption 5 to conduct deliberative processes out of public view in the interest of "frank discussion" and exempting questionnaires returned to DOJ by Senators that contained "probing analysis" of background of candidates for federal judgeships). In a similar case involving disclosure of background information on a federal judge, *Information Acquisition Corp. v. Department of Justice*, 3 GDS ¶ 83,149, (D.D.C. 1981), the court denied disclosure under FOIA of documents collected by the FBI on a nominee for a federal judgeship because release would have violated substantial privacy interests and because there was a "strong public interest in candid and thorough investigations of presidential appointments." *Id.* at 83,782-83. The court further explained that certain documents consisting of communications to the President and the then-nominee from various individuals within and without the government were exempt from FOIA because "[t]hese documents are essential to the deliberative process of appointing judges to the federal bench and disclosure might chill the frank and candid evaluations from government individuals and private citizens that are necessary for the effective functioning of the appointment process." *Id.* at 83,785.

Plaintiffs contend that it is premature at this time to conclude that FACA's "openness" provisions would prevent DOJ from accomplishing its task of evaluating and recommending to the President prospective judicial candidates. This argument rings hollow. Plaintiffs cannot have it both ways. Plaintiff WLF specifically requests as relief that this Court declare that "all" of FACA's requirements apply to the ABA Committee.[52] Public Citizen's complaint requests broadly that DOJ be ordered "to comply with FACA's requirements."[53] Although it may be strategically wise to suggest that this Court need not concern itself with the implications of actually applying FACA to the ABA Committee, it is disingenuous to argue that this Court is somehow "not confronted with a concrete case involving the specific application of any of FACA's provisions."[54] It must be presumed that plaintiffs mean what they say in requesting that FACA's few basic requirements be applied to the ABA Committee. Plaintiffs have not pointed to any support for their argument that only a theoretical facial application of FACA need be addressed here.[55] In particular, plaintiffs' argument that the ABA Committee may ultimately be found exempt from some of FACA's requirements under the deliberative process exemption is entirely unpersuasive.[56]

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[52] WLF's Complaint, at 9.

[53] Public Citizen's Complaint, at 4.

[54] Public Citizen's Opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and in Support of Its Motion for Summary Judgment ("Public Citizen Opp."), at 2.

[55] *See Food & Chemical News*, 378 F. Supp. at 1051 ("Clearly where, as here, a federal agency utilizes an advisory committee for the purpose of obtaining advice, the agency must charter and establish the committee in compliance with *all* the terms of the Act.") (emphasis added).

Plaintiffs also attempt to minimize these intrusiveness concerns by pointing out that the President has voluntarily subjected "established" advisory committees, such as the Tower Commission, to FACA even though the subject matter of the committee involved sensitive foreign policy or national security issues.[57] These examples do not dissuade the Court that application of FACA to the ABA Committee could be significantly disruptive. Each advisory committee must be evaluated individually according to its role, purpose, function, and relationship to the agency or Presidential mandate at issue; and, as explained above, the clearly prescribed role of Congress set forth in Article II is an important basis for decision in this case.

The unique need for confidentiality in the initial stages of evaluating the professional qualifications of potential nominees for federal judgeships distinguishes this case from others where the public interest would be served by full disclosure throughout the agency's decisionmaking process. Unlike ordinary policy research and analysis, investigation of an individual's "competence, integrity, and temperament"[58] is inevitably a sensitive undertaking and it would normally evoke forthright, critical comments that would not otherwise be provided to decisionmakers were the comments to be made public. Furthermore, here, the public and Congress have a full opportunity

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[56] As the Court noted in *Nader v. Dunlop*, 370 F. Supp. 177 (D.D.C. 1973), only "on the rarest occasions can the deliberative process exemption be properly invoked under FACA." *Id.* at 179. As defendant suggests, FACA was "designed to abrogate the deliberative privileges." Def. Opp. at 26 n.21.

[57] Public Citizen Opp. at 29.

[58] ABA, *Standing Committee*, at 5.

to evaluate the actual nominee and to probe more deeply through the Senate confirmation hearings once the initial screening has been finished by the Executive.

Given this potential for significant disruption, the analysis turns to the second part of the *Nixon* analysis— whether there is an "overriding" congressional interest in application of FACA to the ABA Committee. As discussed above, the only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function. Art. II, § 2, cl. 2. The purpose furthered by FACA—public accountability—is satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information.[59] Other groups and individuals also have an opportunity to present their own views of the nominee and to differ with the ABA Committee regarding the nominee's qualifications. The Senate (like DOJ) is free, of course, to reject the advice from the ABA Committee and from others. Indeed, that members of the Senate Judiciary Committee have questioned the role of the ABA Committee for the same reasons proffered by plaintiffs demonstrates that Congress can seek greater accountability directly, without interfering in the initial selection process through FACA.[60]

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[59] It is noteworthy that while the ABA Committee keeps its sources and deliberations confidential, it does make public a detailed explanation of its purpose, structure, membership, and procedures in the form of the *Standing Committee* booklet.

[60] *See, e.g.*, Mathias, *Advice and Consent*, at 206 ("The ABA Committee should be encouraged to provide more detail on the evaluation of nominees referred to it, particularly in cases in which it is less than unanimous in its conclusion that a nominee is qualified."); *Bork Hearings*, at 938 (remarks of Sen. Grassley: "[W]e have put great weight on the ABA's opinion . . . . So why should we not freely discuss who is for and who is against? That makes people responsible for their actions, if they

While the deliberations of the ABA Committee have not gone uncriticized, few would doubt that the ABA Committee has contributed significantly to the integrity of the nomination process for federal judges and that the members of the ABA Committee have performed a difficult task and valuable public service, without compensation, and quite often without thanks.[61] Not surprisingly, the ABA Committee itself, while not a party to this action, has clearly gone on record as vigorously objecting to the argument that it is subject to FACA.[62]

Plaintiffs have thus not articulated any compelling, let alone overriding, congressional justification for applying FACA to the ABA Committee and under *Nixon* application of the statute would, therefore, be unconstitutional.

II. Conclusion

In sum, the Court concludes that DOJ utilizes the ABA Standing Committee on Federal Judiciary as an advisory commit-

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serve a kind of quasi-public function, which I think the ABA does in this particular instance."); *Kennedy Hearings*, at 27 (remarks of Sen Hatch urging ABA Committee to "remov[e] cloak of anonymity from your proceedings"); *id.* at 31-32 (remarks of Sen Hatch: "If we see another repeat of what happened to Judge Bork, this Senator is going to do everything in his power to make sure that there will be explanations given in full, fair, and open hearings."); *id.* at 86 (remarks of Sen. Biden: indicating interest in discussing Judiciary Committee's relationship with ABA Committee); ***but see id.*** at 71 (remarks of Sen. Biden: "preposterous" to suggest that ABA Committee should open up entire process to public view because "[s]ome of what you hear is hearsay. Some of what you hear is gossip. Some of what you hear is substantive.").

[61] *Bork Hearings*, at 978 (remarks of Sen. Biden).

[62] *See* Answer, Civil Action No. 85-3918, ¶¶ 43, 53; *Kennedy Hearings*, at 30 (remarks of Judge Tyler: "to say that we have to have the sunshine laws apply to us, or that we have to individually account, would really turn the whole process, and the work of [the Senate Judiciary Committee] on its head."); *id.* at 67-68 (remarks of Judge Tyler).

tee as defined by Section 3(2) of FACA, but that the Act cannot be constitutionally applied to the Committee because of the express provision of Article II, § 2, cl. 2, of the Constitution that the President alone shall nominate candidates for federal judgeships. The role of Congress is limited to the Senate's advice and consent function. Furthermore, as discussed above, the purposes of FACA are served through the public confirmation process and any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees.

Accordingly, it is hereby

ORDERED that plaintiffs' motions for summary judgment be and they hereby are denied; it is

FURTHER ORDERED that defendant's motion to dismiss or, alternatively, for summary judgment be and it hereby is granted.

This action is dismissed. A separate judgment accompanies this Memorandum Opinion.

IT IS SO ORDERED.

August 4, 1988

/s/ Joyce Hens Green
Joyce Hens Green
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION,)
Plaintiff,)
and)
PUBLIC CITIZEN,)
Plaintiff-Intervenor,)
)
)
v.)
UNITED STATES DEPARTMENT OF)
JUSTICE,)
Defendant.)

FILED
Aug 4 1988
Clerk, U.S. District
Court
District of Columbia
Civil Action No. 86-2883

JUDGMENT

In accordance with the Memorandum Opinion issued this same date, judgment is hereby entered against plaintiff Washington Legal Foundation and plaintiff-intervenor Public Citizen and in favor of defendant United States Department of Justice.

IT IS SO ORDERED.

August 4, 1988

/s/ Joyce Hens Green
Joyce Hens Green
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION,)
Plaintiff,)
)
PUBLIC CITIZEN,)
Plaintiff-Intervenor,)
v.)
UNITED STATES DEPARTMENT OF)
JUSTICE,)
Defendant,)
AMERICAN BAR ASSOCIATION,)
Defendant-Intervenor.)

Civ. No. 86-2883 (JHG)
(Judge Joyce Hens Green

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that plaintiff-intervenor Public Citizen hereby appeals to the Supreme Court of the United States from the final judgment of the Court denying plaintiff-intervenor's motion for summary judgment, and granting defendant's motion for summary judgment, which was entered on August 4, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

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D.C. Bar No. 358287

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September 1, 1988

Attorney for Plaintiff-
Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing plaintiff-intevenor's Notice of Appeal to the United States Supreme Court has been served, this 1st day of September, 1988, by first-class mail, postage-prepaid, on all counsel:

Thomas Millet
Department of Justice
Civil Division—Room 3515
10th & Pa. Ave., N.W.
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/s/
Eric R. Glitzenstein

APPENDIX D

Federal Advisory Committee Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Advisory Committee Act".

FINDINGS AND PURPOSES

SEC. 2.(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that:

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

DEFINITIONS

SEC. 3. For the purpose of this Act

(1) The Term "Director" means the Director of the Office of Management and Budget.

(2) The Term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committees" means an advisory committee which advises the President.

APPLICABILITY

SEC. 4.(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

RESPONSIBILITIES OF CONGRESSIONAL COMMITTEES

SEC. 5.(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

RESPONSIBILITIES OF THE PRESIDENT

Sec. 6.(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

RESPONSIBILITIES OF THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Sec. 7. (a) The Director shall establish and maintain within the Office of Management and Budget a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Director shall, immediately after the enactment of this Act, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Director may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Director's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Director shall carry out a similar review annually. Agency heads shall cooperate with the Director in making the reviews required by this subsection.

(c) The Director shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Director shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Director, after study and consultation with the Civil Service Commission, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code; and

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

(2) Nothing in this subsection shall prevent—

(A) An individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Director shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

RESPONSIBILITIES OF AGENCY HEADS

Sec. 8(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

ESTABLISHMENT AND PURPOSE OF ADVISORY COMMITTEES

Sec. 9.(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed. A copy of any such charter shall also be furnished to the Library of Congress.

ADVISORY COMMITTEE PROCEDURES

SEC. 10.(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsection (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

AVAILABILITY OF TRANSCRIPTS

Sec. 11.(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

FISCAL AND ADMINISTRATIVE PROVISIONS

Sec. 12(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

RESPONSIBILITIES OF LIBRARY OF CONGRESS

Sec. 13. Subject to section 552 of title 5, United States Code, the Director shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

TERMINATION OF ADVISORY COMMITTEES

Sec. 14(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

MOTION

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Supreme Court, U.S.
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No. 88-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.

UNITED STATES DEPARTMENT OF JUSTICE,
WASHINGTON LEGAL FOUNDATION, and
AMERICAN BAR ASSOCIATION,
Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

RESPONSE OF APPELLEE WASHINGTON LEGAL FOUNDATION TO APPELLANT'S JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the District of Columbia

RESPONSE OF APPELLEE WASHINGTON LEGAL FOUNDATION TO APPELLANT'S JURISDICTIONAL STATEMENT

Pursuant to Rule 10.4 of the Rules of the Supreme Court, appellee Washington Legal Foundation (WLF) hereby files this response to appellant Public Citizen's Jurisdictional Statement. Inasmuch as appellee WLF, the plaintiff below, filed a separate Jurisdictional Statement (*Washington Legal Foundation v. United States Department of Justice, et al.*, No. 86-2883 (D.D.C. Aug. 4, 1988), *appeal docketed*, No. 88-494 (U.S. Sept. 22, 1988)), WLF seeks review of the same decision as does Public Citizen which had intervened as a plaintiff below. Nevertheless, there are some differences between the appellants, and some points in Public Citizen's Jurisdictional Statement (JS) that WLF wishes to clarify.

1. While Public Citizen filed a complaint similar to WLF's when Public Citizen intervened below as a plaintiff, it did not allege any injury comparable to that alleged by WLF in its complaint. As noted in WLF's Jurisdictional Statement at 7, Public Citizen merely alleged a generalized interest in "government accountability" and the "process by which judges are chosen, because [Public Citizen] regularly brings cases in the federal courts." Public Citizen Complaint ¶ 3. On the other hand, WLF alleged that it was injured when the American Bar Association's Standing Committee on Federal Judiciary refused specific requests by WLF for documents and information on the Committee's meetings. WLF's standing was sustained in *Washington Legal Foundation v. American Bar Ass'n Standing Comm. on Federal Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986), a case in which Public Citizen did not attempt to intervene. Thus, the other appellees in the instant case may raise the standing issue anew with respect to Public Citizen, or this Court may raise it *sua sponte*. *See Bender v. Williamsport Area School Dist.*, 375 U.S. 534 (1985).[1]

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[1] While Public Citizen acknowledges in its Jurisdictional Statement that its complaint and memoranda "were similar to the papers filed by WLF" (JS at 8), it maintains that a "significant" difference was that in its prayer for declaratory and injunctive relief, it "simply asked the district court to enter an order 'declaring that the Justice Department's utilization of the ABA Committee is covered by FACA, and ordering the Department to comply with FACA's requirements when it utilizes the ABA Committee in the future.' Complaint, p. 4." JS at 9. Appellee Washington Legal Foundation sees no significant distinction between that prayer for relief and WLF's prayer that the court "declar[e] that the ABA Standing Committee on Federal Judiciary is a federal advisory committee within the meaning of section 3(2) of the Federal Advisory Committee Act" and "enjoin[ ] the defendant Department of Justice from utilizing the ABA Committee" until all provisions of FACA "are complied with. . . ." WLF Complaint at 9. While WLF also requested that the court order DOJ to provide WLF with the documents it had requested, *id.*, the core prayers for relief by WLF and Public Citizen were essentially the same, and the court below treated them as such. *See* App. 23a.

2. In its Statement of the Case, Public Citizen states that the facts in this case "are straightforward and undisputed." JS at 3. Appellee takes exception to this statement insofar as it believes that the lower court improperly resolved the constitutional issue without a full factual basis, and despite a Rule 56(f) Affidavit filed by appellee Washington Legal Foundation indicating that information in the hands of appellee Department of Justice were needed, *inter alia*, to assay DOJ's bald claims, unsupported by any record evidence, for the need for confidentiality. Accordingly, appellee believes that the Question Presented in its Jurisdictional Statement is the more appropriate one to be addressed by the Court.

3. Public Citizen also states in its Jurisdictional Statement that the "ABA Committee is not used by the Justice Department to advise it concerning potential nominees to this Court" and that therefore, "the activities of the ABA Committee regarding nominees to this Court are not implicated, and will not be affected, by the Court's resolution of this case." JS at 7, n.2. Since there was no discovery in this case, the first part of Public Citizen's statement is pure speculation. Although this assertion may very well be true with respect to recent nominees to the Court, it certainly is not a true statement with respect to past practice, nor is the ABA's utilization by future administrations foreclosed.

In the first place, the ABA Committee's own brochure states that the "Committee evaluates the qualifications of persons *considered* for appointment to the U.S. Supreme Court" and lower court positions. *The ABA Standing Committee on Federal Judiciary: What It is and How It Works* 1 (1983). The 1983 brochure, which was revised from the 1979 edition, goes on into some detail and has a separate heading about its evaluations of Supreme Court nominees, stating:

> It is extremely important to the Committee's effective evaluation of *prospective* Supreme Court

> *nominees* that it be given sufficient time to evaluate them in depth. The procedures described below have been followed recently and have allowed the Committee to afford significant assistance to the *President* in selecting a well-qualified appointee.

Id. at 7 (emphasis added). The ABA document goes on to say that the ABA Committee's rating on prospective Supreme Court nominees "are reported in confidence to the Attorney General. Further evaluation and reports may be provided as the President approaches a choice." *Id.* at 9.

As far as historical practice is concerned, we do know that in 1971, Attorney General John N. Mitchell gave to the ABA Committee, then headed by Lawrence E. Walsh, the names of six possible nominees to fill the vacancies on the High Court left by Justices Hugo Black and John Harlan, and narrowed the list of potential nominees to Mildred Lillie and Herschel Friday. *See* L. Kohlmeier, "God Save This Honorable Court!" 236 (1972). On October 18, 1971, Walsh informed the Attorney General that the two potential nominees would likely get low or unqualified ratings. President Nixon shortly thereafter nominated Justices Lewis Powell and William H. Rehnquist without clearing their names with the ABA, and Mitchell sent a letter to Walsh and Leon Jaworski, then head of the ABA, terminating that Administration's agreement to clear prospective Supreme Court nominees with the ABA. *Id.* at 238-39.

Accordingly, quite to the contrary to what Public Citizen asserts, this Court's resolution of this case may very well have an impact on the ABA's role in screening future nominees to this Court.

CONCLUSION

While both the Washington Legal Foundation and Public Citizen, intervenor below, are appealing from the same decision, there appears to be some difference between the two that may warrant separate considerations of these appeals, depending, in part, on the responses to be made by the other appellees.

Respectfully submitted,

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Date: September 29, 1988

MEMORANDUM

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Nos. 88-429 and 88-494

In the Supreme Court of the United States

OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-429

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 88-495

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL APPELLEE

Appellants Public Citizen and Washington Legal Foundation (WLF) have appealed the district court's judgment that the application of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1-14, to the American Bar Association Standing Committee on Federal Judiciary violates Article II of the Constitution and the separation of powers doctrine by interfering with the President's ability to obtain confidential advice about the qualifications of potential nominees to the federal bench.

1. a. The President is responsible for nominating the Justices of the Supreme Court and the judges of the lower

federal courts. In deciding on such nominations, the President relies on advice from a federal judicial selection committee composed of several senior officials at the White House and the Department of Justice. J.S. App. 5a.[1] As part of the process of advising the President, for the last 36 years the Justice Department has confidentially provided the names of potential nominees to the American Bar Association Standing Committee on Federal Judiciary (ABA Committee) to obtain its opinion of potential nominees' qualifications.

The ABA Committee is a private entity consisting of 14 members drawn from the 328,000-member American Bar Association, which is also a private organization. J.S. App. 4a. At the Department's request, a potential judicial nominee completes a questionnaire designed by the ABA Committee and submits it to the Assistant Attorney General for the Office of Legal Policy, to the Chair of the ABA Committee, and to the Committee member who represents the relevant federal judicial circuit. *Id.* at 5a-6a. Using the answers to this questionnaire, a committee member (ordinarily, the ABA Committee circuit representative) examines the candidate's legal writings and interviews a sample of state and federal judges, lawyers, and law professors in the potential nominee's community, as well as members of professional organizations and other groups interested in the nomination process. *Id.* at 6a; *American Bar Association Standing Committee on Federal Judiciary: What It Is And How It Works* 6 (1983) [hereinafter *ABA Committee*]. During this process, the potential nominee meets with one or more members of the ABA Committee. *Ibid.* All details of the review process are kept confidential. J.S. App. 6a & n.20.

After that investigative process is completed, the ABA Committee representative prepares for the Chair an informal written report, which includes a summary of the candidate's background, a summary of all interviews (including the interview held with the candidate), an evaluation of the candidate's qualifications, and a recommended rating. *ABA Committee* 6. The Chair then provides the Justice Department with an informal evaluation of the candidate, and the Chair passes along the substance of the report with a tentative rating, both of which are confidential. *Ibid.*; J.S. App. 6a. If the Justice Department so requests, a formal report on the candidate is prepared, and the full ABA Committee is polled on the candidate's rating. The Chair then reports the Committee's final rating to the Justice Department and indicates whether it is unanimous. *ABA Committee* 7. On some occasions, Justice Department officials discuss with the ABA Committee the initial evaluation and rating. See Declaration of Steve A. Matthews 4 (Dec. 18, 1986); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess., Pt. 3, at 272-275 (1984). The reasons for the final rating are sometimes revealed to the Justice Department, although the ABA Committee's sources and internal report remain confidential. J.S. App. 6a n.20.[2] Finally, after considering the ABA Committee rating along with other information gathered by the government and submitted by the candidate, the Attorney General recommends to the President whether a candidate should be nominated for the federal bench. *Id.* at 7a.

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[1] This committee consists of the Attorney General; the Counsel, Deputy Counsel, and Associate Counsel to the President; two Presidential Assistants; the Director of Presidential Personnel; the Deputy Attorney General; the Counselor to the Attorney General; and the Assistant Attorney General and Deputy Assistant Attorney General for the Office of Legal Policy. 88-429 J.S. App. 5a n.10. (Unless otherwise noted, all references to J.S. App. will be to the appendix to the jurisdictional statement in No. 88-429.)

[2] If the candidate is nominated, the ABA Committee rating is disclosed during the Senate confirmation hearings. J.S. App. 7a.

b. The FACA, 5 U.S.C. App. 1-14, was enacted in 1972. It imposes various requirements on advisory committees that are "established by statute or reorganization plan," or that are "established or utilized by the President" or (with certain exceptions) "one or more [Executive Branch] agencies." 5 U.S.C. App. 3(2)(A), (B), and (E). For example, a charter describing the committee's objectives and operations must be prepared before the committee can meet and take action. 5 U.S.C. App. 9(c). For advisory committees utilized by the Executive Branch, the statute requires, among other things, that there be timely notice of the committee's meetings and that, subject to a provision of the Government in the Sunshine Act, 5 U.S.C. 552b(c), committee meetings be open to the public. Interested parties must also be allowed to appear before or file statements with the committee. 5 U.S.C. App. 10(a)(3). Advisory committees must keep detailed minutes and transcripts of their meetings, and, subject to the provisions of the Freedom of Information Act, 5 U.S.C. 552, all records, transcripts, and other documents made available to or prepared for or by the committee must be available for public inspection and copying. 5 U.S.C. App. 10(b) and (c). Each advisory committee must have a designated federal officer or employee to chair or attend each committee meeting. That official has the sole power to call or adjourn committee meetings, and to approve the agenda in advance. No meetings may be held in the absence of that official. 5 U.S.C. App. 10(e) and (f).

Since 1974, the Justice Department has formally taken the position that the ABA Committee is not subject to the

FACA.[3] Accordingly, neither the Department of Justice nor the ABA Committee has followed the act's requirements in connection with the Department's consideration of candidates for the federal bench.

c. In December 1985, appellant WLF filed an action in the United States District Court for the District of Columbia against appellee American Bar Association, the ABA Committee, and various private parties, alleging that the ABA Committee is subject to the FACA and must comply with its mandates. The district court dismissed the suit, ruling that the FACA does not supply private parties with a cause of action against a private entity that is not established or financed by the federal government. *Washington Legal Foundation* v. *American Bar Ass'n*, 648 F. Supp. 1353 (D.D.C. 1986), appeal pending, No. 87-7022 (D.C. Cir.).

Shortly before that suit was dismissed, appellant WLF filed this action in the same court against appellee Department of Justice. Appellant Public Citizen subsequently intervened in this action. Both parties asserted that the FACA applies to the ABA Committee and that the government should be enjoined from obtaining that committee's advice in the judicial nomination process until the requirements of the FACA are satisfied. Appellant WLF also sought access from the Justice Department to records of the ABA Committee. The Justice Department argued that the FACA did not apply to the ABA Committee and that, if it did, the FACA would unconstitutionally interfere with the President's ability to obtain the advice necessary to decide whether to nominate an individual to the federal bench.

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[3] In 1973 and 1974, the Department of Justice considered this question and applied the same two-step analysis used by the district court in this case. As an initial matter, the Department concluded that the ABA Committee was covered by the statute. After consultation with the ABA, during which the ABA expressed its unwillingness to continue to advise the President if the ABA were required to comply with the FACA, in a subsequent examination the Department further concluded that the application of the statute to the ABA in this context violated the Constitution. Among those at the Department who participated in the examination was Justice Scalia, who was serving as Assistant Attorney General in charge of the Office of Legal Counsel during part of that period.

In August 1988, the district court dismissed the suit. The court agreed with appellants that the ABA Committee is an "advisory committee" under the FACA and is therefore subject to its requirements. J.S. App. 7a-14a. The court agreed with the Department of Justice, however, that the application of the FACA to the ABA Committee would unconstitutionally interfere with the President's ability to obtain advice on the question whether to nominate an individual for the federal bench. *Id.* at 15a-26a.[4]

d. The judgment of the district court (J.S. App. 28a) was entered on August 4, 1988. A notice of appeal in No. 88-429 was filed on September 1, 1988 (*id.* at 29a), and the jurisdictional statement was docketed on September 9, 1988. A notice of appeal in No. 88-494 was filed on August 26, 1988 (88-494 J.S. App. 1a-2a), and the jurisdictional statement was docketed on September 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[5]

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[4] Appellee American Bar Association intervened in this case after the district court entered judgment.

[5] Section 1 of the Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, repealed 28 U.S.C. 1252 effective September 25, 1988. § 7, 102 Stat. 664. That repeal does not affect this case, because it "shall take effect ninety days after the date of the enactment of this Act" and "shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Ibid.*

2. The district court's holding that the FACA applies to the ABA Committee and is unconstitutional as applied presents substantial questions that should be resolved by this Court after plenary review. We therefore agree with appellants that this Court should note probable jurisdiction over the appeals in Nos. 88-429 and 88-494. Because both appeals present the same questions, they should be consolidated in this Court.[6]

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

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[6] In the earlier suit involving appellant WLF and the ABA Committee, *Washington Legal Foundation* v. *American Bar Ass'n*, *supra*, the district court considered the question whether appellant WLF had standing to challenge the ABA Committee's noncompliance with the FACA. We will address that question and other related preliminary matters in our brief on the merits.

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MEMORANDUM

(4) (3)

Nos. 88-429 and 88-494

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.
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AMERICAN BAR ASSOCIATION,
Appellees.

WASHINGTON LEGAL FOUNDATION,
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Appellees.

On Appeal from the United States District Court for the District of Columbia

MEMORANDUM OF APPELLEE AMERICAN BAR ASSOCIATION IN RESPONSE TO JURISDICTIONAL STATEMENTS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

Nos. 88-429 and 88-494

PUBLIC CITIZEN,
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UNITED STATES DEPARTMENT OF JUSTICE, and
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Appellees.

On Appeal from the United States District Court for the District of Columbia

MEMORANDUM OF APPELLEE AMERICAN BAR ASSOCIATION IN RESPONSE TO JURISDICTIONAL STATEMENTS

The American Bar Association ("ABA") hereby responds to the jurisdictional statements filed by Public Citizen and Washington Legal Foundation ("WLF") seeking plenary review of an order of the United States District Court for the District of Columbia in *Washington Legal Foundation* v. *United States Department of Justice*, 691 F. Supp. 483 (1988).[1] For reasons stated below, the district court's order ought to be affirmed. However, in view of this Court's general practice of noting probable jurisdiction in, and deciding on the merits, cases in which a single district judge has declared an Act of Congress unconstitutional,[2] the ABA does not oppose appellants' requests for plenary review of the district court's order.

STATEMENT OF THE CASE

A. The Judicial Appointment Process And The American Bar Association

Article II, Section 2, of the Constitution empowers the President to appoint members of the federal judiciary with the advice and consent of the Senate. In exercising this power of appointment, the President historically has consulted many sources, including Justice Department officials, Senators, Congressmen and political advisors, who, in turn, may rely on the views and opinions of lawyers, law school deans, state and local bar associations, political groups, and many other sources. App. 4a. During the confirmation process, the Senate and, in particular, the Senate Judiciary Committee, consider a similarly wide range of views. In this case, appellants invoke the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), in an attempt to regulate the efforts of one organization, the ABA, to gather information and express its views during this process and to regulate the ability of the Executive to seek the views of that organization.

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[1] The opinion and order of the district court are reproduced in the Appendix to the jurisdictional statement in No. 88-429 (App. 1a-28a).

[2] *See Bowen* v. *Kendrick*, 108 S. Ct. 1 (1987).

The ABA is a private voluntary professional association of approximately 328,000 attorneys throughout the United States. App. 4a-5a. One of the ABA's principal goals is to promote the administration of justice throughout the Nation. To foster this goal, the ABA has created a large number of committees that operate under the direction of the ABA Board of Governors, including the ABA Standing Committee on Federal Judiciary (the "ABA Committee"). Neither the ABA nor the ABA Committee is affiliated with or controlled by any federal or state governmental entity.

The ABA Committee evaluates, on behalf of the ABA, the professional qualifications of prospective nominees to the federal judiciary. So as not to compromise this evaluative function, the ABA Committee never recommends or proposes candidates for the federal judiciary.[3] Rather, the ABA Committee evaluates the professional qualifications of those persons identified by the President, through the United States Department of Justice, as possible nominees to the federal bench. App. 5a; *Washington Legal Foundation* v. *American Bar Association Standing Committee on Federal Judiciary*, 648 F. Supp. 1353, 1355 (D.D.C. 1986) ("*WLF I*"). The Committee has provided its evaluation to the President with respect to almost every federal judicial appointment since 1952 and to the Senate Judiciary Committee with respect to every federal judicial nominee since 1948. *ABA Standing Committee* at 1.

The ABA Committee's fact gathering is generally performed initially by the ABA Committee member for the Circuit in which the judicial vacancy exists. App. 5a-6a; *ABA Standing Committee* at 5-6. The Circuit member examines the available legal writings of the prospective nominee and conducts a large number of confidential interviews with judges, law professors, and a representative number of lawyers in the nominee's community, seeking information concerning the prospective nominee's competence, integrity and temperament. *Id.* at 5. This information-gathering process includes a meeting between the Circuit member and the prospective nominee, which affords the prospective nominee an opportunity to discuss his or her qualifications for a judgeship and to respond to any adverse information gathered during the interview process. App. 6a; *ABA Standing Committee* at 6.

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[3] ABA, *Standing Committee on Federal Judiciary: What It Is and How It Works* 1 (1983) ("*ABA Standing Committee*") (attached as Exhibit A to WLF's Conditional Response to Defendant's Statement of Material Facts filed April 30, 1987).

Confidentiality is absolutely essential to the Committee's work. If persons interviewed knew that their views might be disclosed, they would not be willing to speak candidly about persons in whose courts they might later appear. Accordingly, every attempt is made during the interview process to protect the confidentiality of information provided by both prospective nominees and persons interviewed. App. 6a. Details concerning individual interviews, including the identity of those interviewed, are not disclosed to the Department of Justice or to the public. *Id.*

At the conclusion of the initial information-gathering process, the Circuit member prepares a confidential written report to the chairman. This report contains a description of the prospective nominee's background, summaries of all interviews conducted (including the interview with the prospective nominee), an evaluation of the prospective nominee's qualifications and one of four recommended ratings ("Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified"). App. 6a. When a rating of "Not Qualified" is a significant possibility, that fact is communicated orally to the Department of Justice before the process goes beyond the information-gathering stage. ABA Answer to WLF Complaint ¶¶ 11-12. Under such circumstances, the prospective nominee's name on occasion has been withdrawn from consideration for a particular vacancy and the Committee has not conducted any further investigation or evaluation.

Absent the Department's withdrawal of the nominee's name, or if the initial report indicates that the rating of the prospective nominee is likely to be "Qualified" or better, the Circuit member then sends to all members of the ABA Committee a confidential written formal report, the response to a personal data questionnaire and any other materials thought relevant by the Circuit member. *ABA Standing Committee* at 6. After studying the formal report and its enclosures, each member transmits by mail or telephone a vote to the chairman. *Id.* at 6-7. If questions are raised, the ABA Committee may discuss the prospective nominee by telephone conference call or at a meeting. *Id.* at 7. The chairman then confidentially informs the Attorney General's office in a one or two sentence written report of the ABA Committee's rating. App. 6a. If the ABA Committee has been unanimous in its rating, the report so states. *Id.* Otherwise, the report reflects the rating given by a majority or substantial majority of the ABA Committee. *Id.* The ABA Committee discloses to the Attorney General only the rating upon which it has decided; neither the content of the Circuit member's report to the full ABA Committee nor any of the interviews conducted by the ABA Circuit member is disclosed. *Id.*

The ABA Committee's rating, along with other information, such as Federal Bureau of Investigation reports, and the candidate's financial declaration and medical background, are then considered by the Attorney General in making a recommendation to the President. App. 7a. If the President nominates the prospective nominee, the Senate Judiciary Committee conducts a public hearing on the nomination at the beginning of the confirmation process. The ABA Committee submits its rating in writing to the Judiciary Committee. Again, only the rating is made public; all other information concerning the ABA Committee's deliberations remains confidential.

B. The Federal Advisory Committee Act

Although appellants generally attempt to show that the FACA imposes on the government and federal "advisory committees" only relatively modest "procedural" requirements,[4] such a conclusion is incorrect. Section 3(2) of the FACA defines "advisory committee" as:

> [A]ny committee, board, commission, council, conference, panel, task force, or other similar group * * *, which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

5 U.S.C. App. II § 3(2). Numerous requirements apply to groups meeting this definition. For example, "an officer or employee of the Federal Government" must be designated "to chair or attend each meeting of each advisory committee" and advisory committees are flatly prohibited from conducting "any meeting in the absence of that officer or employee." *Id.* § 10(e). The federal officer or employee is authorized "whenever he determines it to be in the public interest, to adjourn any . . . meeting" of an advisory committee. *Id.* Advisory committees are also prohibited from holding any meeting "except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government." *Id.* § 10(f). The FACA also requires advisory committees to provide the public with advance notice of meetings and to hold open meetings. *Id.* § 10(a); *see National Anti-Hunger Coalition* v. *Executive Committee*, 711 F.2d 1071, 1073 (D.C. Cir. 1983). The FACA further mandates that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents" provided to or prepared by an advisory committee "shall be available for public inspection and copying at a single location . . . ." 5 U.S.C. App. II § 10(b).

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[4] *See, e.g.*, WLF J.S. at 3-4; Public Citizen J.S. at 3-5.

C. Proceedings Below

WLF initiated this litigation by filing a complaint against the United States Department of Justice on October 21, 1986, that was largely identical to a suit filed a year earlier by WLF against the ABA and the ABA Committee.[5] In its complaint in this case, WLF asserted that it "wishes to participate further in the federal judicial selection process, including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public." WLF Complaint ¶ 3. To that end, WLF requested the names of potential judicial candidates reviewed by the ABA Committee, the reports and minutes of all meetings of the Committee held during the last two years, and the date and place of all future meetings. *Id.* ¶¶ 15-16. The ABA declined to comply with WLF's requests. *Id.* ¶ 18. WLF further alleged that "[a]t least since the election of President Reagan in 1981, the ABA has investigated . . . judicial candidates' political and ideological philosophy . . . in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President." *Id.* ¶ 10. In view of these allegations, WLF requested, *inter alia*, that the court enter an order requiring the ABA Committee to provide advance notice of its meetings and to hold those meetings in public (*id.* ¶ 25-27) and requiring that the Committee's "records, transcripts, working papers, and other documents" be made available for public inspection (*id.* ¶¶ 33-36).

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[5] On November 26, 1986, the district court dismissed WLF's original suit against the ABA defendants. While noting that defendants had "raised serious questions about the constitutionality of plaintiff's proposed application of the FACA," the court did not reach those questions. *WLF I*, *supra*, 648 F. Supp. at 1356. Instead, the court held that the FACA does not create a private right of action solely against a "private, preexisting group" which provides advice to the government. *Id.* at 1361. That ruling is not at issue in this case. WLF has appealed *WLF I* to the Court of Appeals for the District of Columbia Circuit, which has held that proceeding (No. 87-7022), pending the outcome of this case.

In a decision issued August 4, 1988, the district court granted the Justice Department's motion to dismiss.[6] App. 1a-27a. The district court first concluded that the ABA Committee falls within the FACA's definition of "advisory committee." *Id.* at 7a-14a. However, the court then held that application of the FACA to the activities of the ABA Committee would violate the constitutional principle of separation of powers. *Id.* at 15a-27a.

The district court began its constitutional analysis by holding that, in light of the different roles explicitly assigned by the Constitution to the President (nomination) and Congress (advice and consent) with respect to the appointment of federal judges, the Legislative Branch should not be permitted to interfere with the Executive's selection process. *Id.* at 15a-19a. Next, applying this Court's decision in *Nixon* v. *GSA*, 433 U.S. 425 (1977), the district court considered whether the "potential for disruption" of the Executive's power to nominate caused by the application of the FACA in this case is "justified by an overriding need to promote objectives within the constitutional authority of Congress." App. 19a-20a (*quoting Nixon* v. *GSA*, 433 U.S. at 443). The district court found that there is "obvious and significant potential for disruption" stemming from the severe intrusion on the President's ability to obtain "confidential, candid

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[6] Subsequent to the filing of the Justice Department's motion, appellant Public Citizen moved for and was granted leave to intervene in this case.

and timely advice concerning the qualifications of potential nominees for the federal courts." App. 20a. The court then found that there was no "overriding" interest in application of the FACA to the ABA Committee because the Act's purpose—public accountability—would be satisfied through Senate confirmation proceedings at which Judiciary Committee members may question a representative from the ABA Committee and request additional information. App. 25a.

Based on these findings, the district court held that the FACA cannot constitutionally be applied to the ABA Committee's activities.[7] These appeals followed.

THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED, BUT THE ISSUES RAISED ARE OF SUFFICIENT IMPORTANCE TO WARRANT PLENARY REVIEW BY THIS COURT.

The district court properly dismissed the complaints in this case and its order, therefore, should be affirmed. The district court correctly found that application of the FACA to the process by which the ABA evaluates potential judicial nominees and communicates its evaluations to the Executive Branch would severely intrude on the President's ability to obtain "confidential, candid and timely advice concerning the qualifications of potential nominees for the federal courts." App. 20a. Such an intrusion would violate the constitutional doctrine of separation of powers. Furthermore, application of the FACA to the ABA's internal communications and expression on governmental affairs would result in the most elementary kind of unlawful governmental infringement on freedom of association and freedom of speech.

However, this Court need not reach any of these constitutional questions because examination of the FACA and its legislative history demonstrates that it was not intended to cover those groups not formally established as "advisory committees" under that Act, and that provide information to the President or his delegatees in matters exclusively committed to the President under the Constitution, such as the nomination of candidates for appointment to the federal judiciary.

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[7] After judgment, the ABA intervened in the district court as a party defendant for the purpose of participating in this appeal.

A. Application Of The FACA To Communications With The Executive Branch Relating To Judicial Appointments Would Violate The Separation Of Powers Doctrine.

The power to nominate federal judges belongs solely to the President. Appellants' assertion that the President shares this nomination power with Congress is refuted by the plain language of the Constitution (Article II, Section 2) and by the decisions of this Court. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976). Federal district and circuit court judges are constitutionally required to be nominated by the President and appointed by him with the advice and consent of the Senate. The district court correctly held that this nomination and appointment power is not a "shared" power in which Congress has a constitutionally authorized interest that might permit application of statutes like the FACA to the Executive's appointment process. App. 16a-19a. Thus, while the Constitution does recognize a Legislative Branch interest in the appointment of federal judges, that interest is strictly limited by the Constitution to the Senate's rejection or acceptance of the President's nominations. Accordingly, legislation like the FACA impermissibly invades the complete authority of the President over the consideration and nomination of federal judges.

Even if this Court were to conclude that Congress may participate in the nomination and appointment process beyond the Senate's advice and consent role, the application of the FACA and its burdensome and intrusive requirements to that process would clearly present a "potential for disruption" of the President's constitutionally assigned function which could not be justified by an "overriding need" to promote legitimate congressional objectives. *See Nixon* v. *GSA*, 433 U.S. at 443. Application of the FACA to the ABA Committee would dictate the manner in which the President can obtain advice, impose congressional restrictions on the President's choice of advisors to fulfill that exclusively committed constitutional duty, and mandate broad public access to the process by which the President carries out that function. In particular, confidentiality, prior to the submission of a nomination to the Senate, is essential for candid presentation of views. This Court recognized in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), that confidentiality is

> a necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

These concerns and principles are fully implicated in the President's solicitation of information regarding the qualification of individuals for nomination to the federal bench. As the district court properly recognized, the President needs and is entitled to the fullest candor of individuals and organizations regarding his nominations to these important life-tenured positions if he is to fulfill his constitutional duties properly. App. 21a-25a. If there are questions concerning a particular nominee, the President must have that information prior to formal submission of a nominee to the Senate for confirmation. However, in light of the concern for individual privacy, as well as the general prestige, political influence, and potential power of judicial nominees within the legal community, individuals or organizations may well temper their views and the thoroughness of their investigations if the FACA, and its attendant disclosure requirements, were applicable.

This potential disruption of the President's accomplishment of his constitutional duty is clearly not justified by an "overriding need" to promote constitutionally authorized Congressional objectives. *Nixon* v. *GSA*, 433 U.S. at 443. The interests Congress explicitly intended to be served by the FACA cannot justify the severe intrusion on the President's appointment power because those interests either are not implicated in the President's use of the ABA Committee or are already adequately served by the Senate's advice and consent role under the Constitution.[8]

Finally, as the district court properly found, there is no merit to appellants' argument that it is premature to consider whether application of the FACA's disclosure provisions would interefere with the President's appointment power.[9] *See, e.g.*, Public Citizen J.S. at 15-18. The entire thrust of WLF's complaints against the ABA and the Department of Justice is its desire to participate in meetings held by the ABA Committee and to review the Committee's records and reports. *See* discussion at 7-8, *supra*. Accordingly, Public Citizen, which intervened in

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[8] *See* discussion *infra*, at 18-19 & n.16.

[9] The district court flatly rejected this argument, stating (App. 23a):

> Plaintiffs cannot have it both ways. Plaintiff WLF specifically requests as relief that this Court declare that "all" of FACA's requirements apply to the ABA Committee. Public Citizen's complaint requests broadly that DOJ be ordered "to comply with FACA's requirements." Although it may be strategically wise to suggest that this Court need not concern itself with the implications of actually applying FACA to the ABA Committee, it is disingenuous to argue that this Court is somehow "not confronted with a concrete case involving the specific application of any of FACA's provisions." It must be presumed that plaintiffs mean what they say in requesting that FACA's few basic requirements be applied to the ABA Committee.

this case only after the Government filed its motion to dismiss WLF's complaint, should not now be heard to argue that WLF's complaint does not really mean what it says and that the disclusure provisions of the FACA are not necessarily implicated in this case.

B. Application Of The FACA To The Activities Of The ABA Committee Would Violate The First Amendment.

1. The First Amendment plainly protects the right of association of ABA members. Courts and commentators have long recognized that "effective advocacy of both private and public points of view is undeniably enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).[10] Indeed, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court noted that First Amendment freedoms "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622. Therefore, implicit in the right to engage in protected First Amendment activities is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Id. Accord*, *Board of Directors of Rotary Club Int'l* v. *Rotary Club of Duarte*, 107 S. Ct. 1940, 1947 (1987). A statute unconstitutionally infringes on this "freedom to engage in group efforts" when it attempts to require disclosure of a group's inner workings, *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982), or when it tries to "interfere with the internal structure or affairs" of the group, *Cousins* v. *Wigoda*, 419 U.S. 477, 487-88 (1975). *See Roberts*, 468 U.S. at 622-23.

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[10] *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

In addition to freedom of association, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The free discussion at issue here has two related, but distinct, aspects. First, the ABA Committee and its members are entitled, as private citizens and a group of private citizens, to gather information and confer among themselves and with members of their profession and communities concerning governmental affairs. Second, the Committee and its members have the further, independent right to petition the federal government concerning these governmental affairs. *See McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

2. Application of the FACA to the ABA Committee would violate these First Amendment interests. The speech at issue includes the discussion and evaluation of prospective nominees to the federal bench. This speech plainly pertains to governmental affairs. Application of the FACA to the ABA Committee would turn public glare upon the ABA Committee and its works, destroying the confidentiality of the ABA Committee's evaluation process and chilling speech on matters of public concern, which lie at the heart of the First-Amendment. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 n.5 (1985); *Mills v. Alabama*, 384 U.S. 214 (1966). *See also* App. 21a. The need for confidentiality is particularly compelling in the ABA Committee's evaluation process. Confidentiality is essential in judicial evaluations to ensure free and honest expression.[11] Confidentiality encourages participation in the

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[11] *See, e.g., In re Petition of Illinois Judicial Inquiry Board*, 128 Ill.App.3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before"); *Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979).

evaluation process, protects participants from retribution or harassment, and maximizes candor.[12]

Application of the FACA would also result in direct governmental intrusion into the affairs of the ABA Committee. Application of the FACA would compel the Committee to file an advisory committee charter with a federal agency (5 U.S.C. App. II § 9(c)), notify the public of Committee meetings in advance (§ 10(a)(2)), open Committee meetings and records to the public (§§ 8(b), 10(a)(1),(b)), and permit a federal official to attend all Committee meetings (§ 10(e)) and adjourn any of these meetings upon determining that adjournment would serve the "public interest" (*id.*). Such government intrusion under the FACA would destroy the right of the private Committee members to select the persons with whom they wish to associate for the purpose of developing and expressing their views. This intrusion also would enable the government to shape the content of the views of the ABA Committee by, for example, adjourning Committee meetings as soon as "undesirable" views were expressed (*id.*). Such wholesale interference with the rights of association and expression of a private group is virtually without precedent.

3. The governmental interests served by the FACA cannot justify this substantial infringement of First Amendment rights. To survive judicial scrutiny, a statute directly infringing First Amendment rights of freedom of association and expression—as appellants would apply the FACA—must (1) be intended to achieve a compelling governmental interest, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *and* (2) be narrowly drawn

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[12] *See People ex rel. Ill. Judicial Inquiry Board* v. *Hartel*, 72 Ill.2d 225, 380 N.E.2d 801 (1978); *In re Petition of Illinois Judicial Inquiry Board*, 128 Ill.App.3d 798, 471 N.E.2d 601 (1984); *Baumgarten* v. *Koch*, 97 Misc.2d 449, 411 N.Y.S.2d 487 (1978); *Lambert* v. *Barsky*, 91 Misc.2d 443, 398 N.Y.S.2d 84 (1977).

to vindicate that interest, *Bellotti*, 435 U.S. at 793-95; *NAACP* v. *Button*, 371 U.S. at 435-38. *Both* of these requirements must be met for an infringing governmental action to be held constitutional. But the FACA, as broadly interpreted by the appellants, satisfies *neither* of these standards.

Here appellants cannot show any compelling government interest that would even colorably justify application of the FACA to the ABA Committee. No legitimate governmental interest would justify the abridgement of First Amendment rights resulting from application of the FACA to a private group like the ABA Committee. The government obviously has no legitimate interest in restricting or shaping the flow of information and views from private groups. Indeed, the government has not defended the proposed abridgement of the First Amendment rights of the ABA Committee and its members. Instead, in this case two private organizations seek the violation of another private organization's constitutional rights through an unprecedented application of the FACA, even though no evidence indicates that Congress ever intended the Act to be so applied.

Moreover, the FACA, as appellants would apply it, could not even colorably be characterized as "narrowly drawn" to vindicate a legitimate government interest. Any legitimate interest in open governmental communications can readily be satisfied by less restrictive means —*i.e.*, by regulating the conduct of government officials and by specifying the communications that *they* must place in the public record.

C. This Court Should Avoid Reaching The Constitutional Issues Raised By Appellants' Interpretation Of The FACA By Holding That The Act Does Not Apply To The Activities Of The ABA Committee.

As demonstrated above, the FACA cannot be constitutionally applied to the process by which the ABA evaluates potential federal judicial candidates and communicates its evaluations to the Executive Branch. However, this Court need not, and indeed should not, decide this constitutional question. It is firmly established that interpretations implicating the constitutionality of statutes should be avoided if at all possible.[13] Pursuant to this basic principle, and contrary to the district court's ruling, the FACA should be construed not to apply to the communication of its evaluations to the Executive Branch.

Section 3 of the FACA expressly limits the definition of "advisory committee" to those groups "established" or "utilized" by the government "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government." The ABA Committee does not meet this definition. "Advice or recommendations" concerning prospective nominees would state whether the individual should be appointed. However, the Committee never reaches the question whether a prospective nominee should be appointed.[14] Indeed, the ABA Committee consistently has followed a policy of refusing to advise or recommend to the President or Senate Judiciary Committee any particular candidate for appointment to or confirmation for the federal bench. *See* discussion at 3, *supra*. The ABA Committee simply discloses an evaluation that it independently compiles, and would have the right to compile, even absent any request by the government.

Moreover, neither the language of the statute nor its legislative history indicates a congressional intent that the Act encompass entities like the ABA Committee which provide information used by the President to perform functions exclusively committed to him under the Constitution. The courts have repeatedly noted the imprecision, ambiguity and extreme breadth of the FACA's language generally, and have recognized the stifling effect that literal application of its terms would have on the conduct of government affairs.[15] In light of the imprecision of its terms and the absence of any express legislative intent that the FACA was intended to apply to the activities of the ABA Committee, the statute must be interpreted in accordance with the purposes intended to be served by Congress, giving full weight to the presumption that Congress intended an interpretation that is constitutional and avoiding constitutional questions by "adopting a saving statutory construction not at odds with fundamental legislative purposes." *United States* v. *Clark*, 445 U.S. at 31.

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[13] *See, e.g., United States* v. *Security Industrial Bank*, 459 U.S. 70, 78 (1982); *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981); *United States* v. *Clark*, 445 U.S. 23, 27 (1980).

[14] Even when the ABA Committee finds that a prospective nominee is "not qualified," it does not recommend that the nominee be removed from consideration.

As indicated throughout the legislative history and cases construing the FACA, Congress enacted the FACA to: (1) control expenditures of federal resources on needless advisory committees; and (2) counteract the tendency of private special interest groups to exercise undue influence over federal agencies with regulatory or policy authority over matters directly involving those interests. These objectives are reflected in the stated purposes of the FACA. *See* 5 U.S.C. App. II, § 2(b).[16]

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[15] *See, e.g., Natural Resources Defense Council* v. *Herrington*, 637 F. Supp. 116, 119-20 (D.D.C. 1986); *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), *aff'd in part*, 580 F.2d 689 (D.C. Cir. 1978); *Nader* v. *Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975), *vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977).

[16] *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 1, 3, 4-5, 16 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6, 8, 10 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491; 118 Cong. Rec. 30271-72, 30276, 30280 (1972); 118 Cong. Rec. 16296-300,

These objectives do not apply to the ABA Committee. The Committee was not established and is not funded in any manner by the federal government. *See WLF I*, 648 F. Supp. at 1354. Moreover, the Committee is not a narrow special interest group out to promote its particular viewpoint to a federal agency with regulatory responsibility over that group. Instead, it is a broadly based professional organization, which provides information with regard to the qualifications of particular individuals under consideration for nomination by the President to the federal bench. *See WLF I*, 648 F. Supp. at 1355. Congress certainly did not have such a group or function in mind when it enacted the FACA.

Congress' legislative activity specifically related to the appointment of federal judges indicates that Congress was aware of the constitutional limitations on its power to interfere with the President's exclusive Art. II nomination and appointment powers and did not intend for the FACA to apply to the process by which the President selects nominees. In the Omnibus Judgeship Act of

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16302-03 (1972); 118 Cong. Rec. 31421 (1972) (Rep. Holifield); *Natural Resources Defense Council* v. *Herrington*, 637 F. Supp. at 120.

Consistent with the basic canons of statutory construction discussed above, and with the purposes of the FACA, courts have eschewed a strictly literal interpretation of the FACA. *See National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524 (D.D.C. 1983) (court refused broadly to construe balanced membership requirement and held that FACA requirements did not apply to "task forces" of the defendant committee); *Lombardo* v. *Handler*, 397 F. Supp. 792, 798 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977) (court interpreted the FACA as not applying to groups or organizations providing advice under contract); *Nader* v. *Baroody*, 396 F. Supp. at 1231 (court held that the FACA did not apply to meetings between high-level Executive Branch officials and private sector groups despite the fact that the language of the statute could be read to include the groups involved or other meetings of "two or more non-government persons who advise the President").

1978, Congress conditioned an increase in the number of federal district judges on the promulgation and publication by the President of standards and guidelines for the selection, on the basis of merit, of nominees for district court judgeships. While the Act appears to regulate the President's power of appointment, sections (b) and (c) expressly recognize that the President can waive such standards and that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply" with these sections or any subsequent standards and guidelines. 28 U.S.C. § 133.[17]

The legislative history of the FACA is devoid of any suggestion that Congress had the judicial appointment process in mind when it adopted the FACA. By contrast, when Congress specifically considered the extent to which it could regulate that process, Congress took great care to avoid requiring the President to comply with *any* procedures. In the absence of clear legislative direction that the FACA was intended to control the President's exercise of the judicial appointment power, the FACA should be construed narrowly to avoid an

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[17] The legislative history of the Omnibus Judgeship Act confirms that Congress recognized the constitutional limitations on legislative attempts to control the process by which the President selects judicial nominees. As the Chairman of the House Judiciary Committee explained: "We feel this language [regarding the merit selection guidelines] is not only acceptable, but is in keeping with what are, frankly, constitutional realities. We have no power to circumscribe the President's nominating authority . . . ." 124 Cong. Rec. 33510 (1978) (statement of Rep. Rodino). Thus, the House Judiciary Committee report on the bill made clear that the merit selection procedure "is not an attempt to circumvent, limit or interfere" with the exercise of the President's appointment power. H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978). Some members recognized that even the advisory nature of the merit selection procedure might pose separation of powers problems. *See, e.g.*, 124 Cong. Rec. 34544-45 (1978) (remarks of Sen. Bayh).

unconstitutional result. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Irving* v. *Clark*, 758 F.2d 1260, 1263 (8th Cir. 1985), *aff'd*, 107 S. Ct. 2076 (1987); *Bickel* v. *Burkhart*, 632 F.2d 1251, 1255 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, the district court's order dismissing the complaints in this case should be affirmed. However, in view of this Court's practice of noting probable jurisdiction in, and deciding on the merits, cases in which a single district judge has declared an Act of Congress unconstitutional, the ABA does not oppose plenary review of the district court's order.

Respectfully submitted,

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JOINT
APPENDIX

⑥ ⑤

Supreme Court, U.S.
FILED
JAN 28 1989
JOSEPH F. SPANIOL, JR
CLERK

Nos. 88-429, 88-494
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

**ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

86cv2883 WASHINGTON LEGAL FOUNDATION
v. DOJ

DATE	NR	PROCEEDINGS
10/21/86	1	COMPLAINT filed; Exhibits (4); summons issued (ew) [Entry date 10/28/86]
1/2/87	5	MOTION by defts. to dismiss; Attachments; Declaration of Steve A. Matthews.
2/4/87	8	MOTION by Fed. R. Civ. P., Public Citizen to intervene as pltf; Exhibit (Complaint). (ja)
2/4/87	9	MOTION by pltf-intervenor for summary judgment. (ja)
2/4/87	10	OPPOSITION by pltf to deft's motion to dismiss. (ja)
2/17/87	13	RESPONSE by pltf to public citizen's motion to intervene. (ja)
3/12/87	14	ORDER filed 3/11/87 granting motion of Public Citizen leave to intervene as a party pltf; directing Clerk to file pltf-intervenor's Complaint; and deft's reply to opposition of pltf and intervenor to motion to dismiss to be filed by 3/25/87, see order of Feb 13, 1987. (N) GREEN, J. (ja)
3/12/87	15	COMPLAINT filed 3/11/87 by Public Citizen. (ja)

3/25/87	16	OPPOSITION by deft to pltf-intervenor's motion for summary judgment and reply to pltfs' oppositions to deft's motion to dismiss. (ja)
4/13/87	17	OPPOSITION by pltf-intervenor to deft's motion to dismiss or in the alternative for summary judgment; Exhibits (2). (fiat) (ja) "Let this be filed" GREEN, J.

1987

May 1	18	ORDER filed 4/30/87 setting a hearing on cross-motions for summary judgment for 5/26/87 at 9:30 AM, pltf and pltf-intervenor granted 20-mins. whether the deft granted 40-mins. (N) GREEN, J. (ja)
May 8	19	CONDITIONAL RESPONSE by pltf to deft's statement of material facts; Exhibit, Affidavit. "Let this be filed" (fiat) GREEN, J. (ja)
May 12	20	MOTION (Alternative) by pltf for summary judgment. (ja)
5/18/87	21	OPPOSITION by deft to pltf's alternative motion for summary judgment. (ja)
5/27/87		CROSS-MOTIONS for summary judgment, argued and taken under advisement. (Rep. Gordon Slodysko) GREEN, J. (ja)

1988

8/8/88	29	MEMORANDUM OPINION filed 8/4/88 and ORDER denying plaintiff's motion for summary judgment; granting defendant's motion to dismiss or for summary judgment. (N) GREEN, J. (ja)

8/8/88	30	JUDGMENT filed 8/4/88 is entered against plaintiff Washington Legal Foundation and plaintiff-intervenor Public Citizen and in favor of defendant U.S. Department of Justice. (N) GREEN, J. (ja)
8/25/88	31	MOTION by AMERICAN BAR ASSOCIATION to intervene as party deft; EXHIBITS (Answers to complaints). (ja)
8/25/88	32	ORDER granting AMERICAN BAR ASSOCATION'S motion to intervene as party deft. (N) GREEN, J. (ja)
8/25/88	33	ANSWER by intv-deft American Bar Assoc. to complaint of pltf Washington Legal Foundation. (ja)
8/25/88	34	ANSWER by intv-deft American Bar Assoc. to complaint of intv-pltf Public Citizen. (ja)

1988

Aug 26	35	NOTICE OF APPEAL by pltf Washington Legal Foundation to the U.S. Supreme Court from judgment entered 8/8/88. $5.00 filing fee paid. (ja) (Supreme Court #88-429)
Sep 1	36	NOTICE OF APPEAL by pltf-intv. Public Citizen to the U.S. Supreme Court from judgment entered 8/8/88. $5.00 filing fee paid.

		(Supreme Court #88-494) (ja)
Dec 6	37	CERTIFIED copy of order from Supreme Court of the United States that the statement of jurisdiction having been submitted and considered by the Court and probable jurisdiction is noted, condolidating case numbers 88-429 and 88-494 in the Supreme Court. (USSC NO. 88-429. (mln)
Dec 23		RECORD on appeal to the Supreme Court delivered on 12/23/88: Receipt Acknowledged 12-23-88 . (mln)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL) JOYCE HENS GREEN, J.
FOUNDATION)
1705 N Street, N.W.)
Washington, D.C. 20036)
Plaintiff,)
v.) Civil Action No.
) 86-2883
U.S. DEPARTMENT OF) OCT 21 1986
JUSTICE)
10th & Pennsylvania)
Avenue, N.W.)
Washington, D.C. 20530)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action seeks to enjoin the Department of Justice ("DOJ") from utilizing the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") as an advisory committee with respect to the federal judicial selection process in violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. I. Plaintiff requests declaratory and injunctive relief with respect to, inter alia, DOJ's failure to provide reasonable advance public notice of advisory committee meetings and to require that such meetings be open to the public, and DOJ's failure to maintain and provide the plaintiff and public access to advisory committee records.

JURISDICTION

2. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202.

PARTIES

3. Plaintiff Washington Legal Foundation is a non-profit public interest law center incorporated under the laws of the District of Columbia and has over 200,000 members and supporters nationwide. WLF engages in a broad range of public interest legal activities, including litigation before the federal courts, involving issues of constitutional law, government regulation, national security and defense, criminal justice reform and judicial government accountability. WLF has also engaged in activities specifically designed to improve the judiciary and wishes to participate further in the federal judicial selection process including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public. To that end, WLF requested information from the ABA Committee as further described in ¶¶15-18 infra, which was denied.

4. Defendant Department of Justice is a government agency subject to the requirements of FACA. DOJ has utilized and continues to utilize the ABA Committee as a preferred source of advice on the judicial nominating process including soliciting the ABA's advice on the suitability of persons under consideration for nomination and appointment to Article III courts.

STATEMENT OF THE CLAIM

5. Plaintiff realleges ¶¶1-4 and incorporates them herein by reference.

6. Before an individual can be formally nominated for a federal judgeship, he or she is required by the defendant U.S. Department of Justice to complete an application called a Personal Data Questionnaire. The questionnaire was designed by the ABA and is utilized by the Department of Justice in conjunction with the ABA Committee. At all relevant times, judicial applicants have completed and are continuing to complete this questionnaire.

7. Responses to the questionnaire by the applicant have been and are continuing to be sent to the Justice Department and to the ABA Committee as required by DOJ.

8. At the behest of the DOJ, the ABA Committee has undertaken and continues to undertake investigations and evaluations of prospective judicial nominees in order to advise DOJ of the suitability of the candidate to be a judge.

9. In the course of performing its advisory functions, the ABA Committee has secretly met with, consulted and solicited the views of, and continues to secretly meet with, consult and solicit the view of, selected liberal political organizations or their representatives including People for the American Way, the Alliance for Justice Judicial Selection Project, the American Civil Liberties Union, the NAACP, the NationalOrganization for Women, the Center for Law and Social Policy, and other groups opposed to the appointment of conservative candidates to the federal judiciary.

10. At least since the election of President Reagan in 1981, the ABA Committee has investigated and continues to investigate the judicial candidate's political and ideological philosophy in cooperation with one or more groups referred to in ¶9. Investigations have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President.

11. The ABA Committee has secretly met with and continues to meet secretly with one or more representatives of the defendant Department of Justice to provide them with advice or recommendations on the judicial selection process including advising the Justice Department on the qualifications of applicants for a federal judgeship.

12. If the advice or recommendation referred to in ¶11 indicates that the candidate is not considered qualified to be a judge by the ABA Committee or is otherwise viewed as unfavorable, the DOJ relies on that advice by removing the candidate's name from further consideration.

13. If the advice or recommendation referred to in ¶11 is favorable, the candidate's name is forwarded by DOJ to the President of the United States for nomination, and by and with advise and consent of the Senate, appointment as a federal judge.

14. The ABA Committee has opposed or supported and continues to oppose or support judicial candidates for nomination and appointment as authorized by the ABA By-laws and other governing documents.

15. On September 30, 1985, plaintiff sent a letter to the Chairman of the ABA Committee, Robert B. Fiske, Jr. requesting the names of all those federal judicial candidates being reviewed by the Committee in order that plaintiff could participate in the judicial selection process and to ensure the fairness of the proceedings. See Exhibit A. Those names have been and are currently being provided by the ABA defendants to the liberal groups as noted in ¶9.

16. Having failed to receive a reply to the September 30 letter, plaintiff sent a second letter on October 18, 1985 to defendant Fiske and to defendant William W. Falsgraf, President of the ABA reiterating itsprior request of September 30th. In addition, plaintiff requested that the Committee provide plaintiff with the reports and minutes of all meetings of the Committee held during the last two years where judicial candidates were discussed and considered, as well as to inform it of the date and place of all future meetings. See Exhibit B.

17. On November 21, 1985, almost a month later without receiving any substantive response or further correspondence or communication from Fiske or other ABA representatives, plaintiff sent a third letter to Messrs. Fiske and Falsgraf reiterating the requests made in the September 30, 1985 and the October 18, 1985 letters. Exhibit C. Plaintiff further requested that the Committee provide it with any and all reports, memoranda, or other documents relating to the Committee's evaluation of Professor Lino Graglia, who was then under consideration for a federal judgeship. Plaintiff further stated that the information requested was disclosable under the Federal Advisory Committee Act of 1972.

18. On November 27, 1985, Fiske wrote a letter to plaintiff stating that the Committee would not comply with plaintiff's requests. See Exhibit D.

19. Since November 27, 1985, WLF has contacted DOJ and has attempted to get DOJ to comply with FACA with

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PUBLISHER'S NOTE:

The following pages are unavailable for filming:

9 - 10

35. The records requested by plaintiff are required by FACA to be disclosed by the defendant.

36. Unless the Court provides plaintiff the relief it seeks, the defendant will continue to deny plaintiff access to the requested records.

WHEREFORE, plaintiff prays that his Court enter an order:

(a) declaring that the ABA Standing Committee on Federal Judiciary is a federal advisory committee within the meaning of section 3(2) of the Federal Advisory Committee Act;

(b) declaring under 5 U.S.C. § 706 that the defendant Department of Justice's utilization of the ABA defendants as an advisory committee is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is without observance of procedure required by law;

(c) preliminarily and permanently enjoining the defendant Department of Justice from utilizing the ABA Committee as an advisory committee, until such time that all the provisions of the Federal Advisory Committee Act, and 41 C.F.R. Subpart 101-6.10 are complied with including providing public notice of future meetings;

(d) enjoining the defendant to assemble and provide plaintiff with all documents requested;

(e) awarding plaintiff its costs and disbursements, including reasonable attorneys' fees; and

(f) granting plaintiff such other and further relief as may be just and proper.

Respectfully submitted,
/s/
DANIEL J. POPEO
/s/
PAUL D. KAMENAR
#914200
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.

Washington, D.C. 20036
(202) 857-0240
Attorneys for Plaintiff

DATE: October 21, 1986

EXHIBIT A C.A. No. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

September 30, 1985

Robert B. Fiske, Jr.
Chairman
Standing Committee on the
Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Mr. Fiske:

According to an article titled "Conservatives Pressing to Reshape Judiciary," which appeared in the September 7 issue of Congressional Quarterly Weekly Report, (copy enclosed), your committee informs the Judicial Selection Project Director, Susan Liss, of persons under consideration by the administration for appointment as federal judges. The article quoted Liss as stating that her group seeks to sidetrack certain potential appointees before they are formally nominated, since "it is very hard to stop a nomination once the name goes to the Judiciary Committee."

The article further indicated that member groups of the Judicial Selection Project such as the NAACP Legal Defense Fund then may conduct their own investigations and send information to the ABA. In addition, I also understand that the ABA sends names of potential appointees to the Alliance for Justice.

The Washington Legal Foundation (WLF) is a non-profit public interest law center with over 200,000 members and supporters throughout the nation. WLF is active in a variety of litigation and regulatory matters as well as the issues of judicial reform, judicial accountability, and judicial qualifications.

I respectfully request that you henceforth provide WLF with the names of persons whom your committee has been informed are under consideration for federal judicial appointments. I further ask that these names be provided promptly once your committee receives them.

Since your committee already provides these names to other groups, WLF's request should not cause any hardship on your committee's reviewing process. Moreover, WLF's purpose in requesting these names is precisely the same as that stated by Ms. Liss in the article: to inform interested groups, which may then provide information to your committees.

Please forward the list of all names currently under review by your committee, and all future such lists, to me at the address above.

I appreciate your consideration and look forward to a prompt and favorable response to this request.

Respectfully submitted,
/s/
Alan Slobodin
Assistant General Counsel

AS:jab

cc: William W. Falsgraf

[Congressional Quarterly Weekly Report,
Sept. 7, 1985 at 1759-63 omitted from printing]

EXHIBIT B CA No. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

October 18, 1985

William W. Falsgraf
President
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611

Robert B. Fiske, Jr.
Chairman
Standing Committee on the
Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Gentlemen:

On September 30, 1985, our office sent you a letter requesting that your committee provide us with the names of all those federal judicial nominees being reviewed by the ABA to determine their fitness for office. To date, we have not heard from you.

On behalf of the Washington Legal Foundation, I hereby again request that you provide us with the names of all the judicial nominees that are now under consideration or will be under consideration for judicial appointments. In addition, we request that you provide us with the reports and minutes of all meetings of your committee held during the last two years where judicial nominees were discussed and considered, as well as inform us of the date and place of all future meetings.

Sincerely yours,
/s/
Paul D. Kamenar
Executive Legal Director

PDK:jab

EXHIBIT C CA NO. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

November 21, 1985

William W. Falsgraf
President
American Bar Association
750 North Lake Shore Drive
Chicago, Il 60611

Robert B. Fiske, Jr.
Chairman
Standing Committee on the Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Gentlemen:

This letter is a follow-up letter to ours dated September 30, 1985 and October 18, requesting records and information from the Standing Committee regarding the federal judicial selection and evaluation process. As of this date, we have yet to receive any substantive response.

We hereby reiterate our request for the information set forth in our prior letters and further request that your committee provide us with any and all reports, memoranda, or other documents relating to your committee's evaluation of Professor Lino Graglia, whom we understand is under consideration for a federal judgeship.

We expect a prompt response to our requests inasmuch as your committee is subject to the Federal Advisory Committee Act of 1972, 5 U.S.C. App. I.

Sincerely yours,
/s/
Paul D. Kamenar
Executive Legal Director

PDK:jab

[Exhibit D CA No. 86-2883]

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

November 27, 1985

Mr. Paul D. Kamenar
Executive Legal Director
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Kamenar:

As I told you in our telephone conversation this morning, our Committee has carefully considered your request, as well as that of other organizations, that we provide you with the names of the candidates for federal judgeships that are given to us for evaluation by the Justice Department and have discussed this matter with William W. Falsgraf, current President of the American Bar Association. For the reasons that follow in this letter, we have concluded that we cannot comply with this request.

As you know, the Standing Committee on Federal Judiciary of the American Bar Association has been consulted by every Administration with respect to almost every federal judicial appointment since 1952. The Committee never proposes candidates for the federal judiciary, believing that to do so would compromise its evaluative function. Rather it considers prospective nominees referred to it by the Department of Justice. Further, the Committee restricts its review to issues bearing on professional qualifications. Other entities, such as nominating commissions, the President and the Senate may consider other aspects of the prospective nominee's qualifications.

In conducting its investigations, the Committee examines the available legal writing of the prospective nominee and conducts a large number of confidential interviews with judges, law professors, and a representative number of lawyers in the nominee's community, including attorneys from different sized offices, attorneys who practice in different fields of law, government attorneys, women attorneys and attorneys who are members of various minority groups.

A primary concern of the Committee in connection with its investigation of prospective nominees is confidentiality. The nomination process is a Presidential function, and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination. It is also important that prospective nominees not ultimately nominated should be spared as much embarrassment as possible resulting from the Committee's investigation.

In reexamining its operating procedures, the Standing Committee has concluded that a practice of furnishing lists of prospective nominees to organized groups is inconsistent with its concerns for confidentiality and obligations to the President. Moreover, it is very difficult to distinguish between groups in a way that would not create great dissatisfaction among a group that was excluded if others were included. Accordingly, the Committee will no longer furnish lists of prospective nominees to any organization but rather will follow its long-standing investigative procedures for gathering the information which it needs in order to make an informed judgment as to a candidate's qualifications.

We wholeheartedly believe that widespread public input is important, in fact, vital to the judicial selection process. The process now permits such input after the nomination has actually been amde and sent to the Senate. If the process is to be modified and lists of prospective nominees are to be furnished to everyone interested in the judicial selection process prior to nominations being made, the decision to do so should be made by the executive branch of the government. Our present understanding is that the executive branch, which provides us with

the names on a confidential basis, does not want such a process to occur at this stage of the judicial selection process.

For similar reasons, we must decline your other requests. It has been generally recognized since 1972 that our Committee is not covered by the provisions of the Federal Advisory Committee Act. Reports on the evaluation of candidates and minutes of meetings during which judicial nominees were discussed are highly confidential and have never been provided to any outside group. To make such reports publicly available would seriously impair, if not destroy, the effectiveness of the Committee's work.

Sincerely yours,

/s/
ROBERT B. FISKE, JR.
Chairman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)

DECLARATION OF STEVE A. MATTHEWS

I, Steve A. Matthews, do declare and say as follows:

1. I am a Deputy Assistant Attorney General, Office of Legal Policy, United States Department of Justice. Pursuant to my official responsibilities, I am personally familiar with the process by which the President exercises his constitutional power of appointment and with the involvement of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") and the ABA Committee members in that process.

2. In the exercise of his authority to nominate candidates for certain public offices, including judgeships in the Article III courts, the President relies upon information made available to him by private citizens, public officials, and government agencies. Such information assists the President first in defining the field of possible nominees, and ultimately in reaching the decision as to which individuals to appoint, subject to the advice and consent of the United States Senate.

3. The Attorney General of the United States and his designees provide such assistance and advice to the President as the President in his discretion deems necessary and appropriate for the proper discharge of his Article II responsibilities. In this capacity, the Attorney General acts as an adviser to the President. To assist the President in his selection of judicial nominees, the Attorney General and his designees have acted to gather certain information about particular individuals who may be considered for nomination and appointment. While the Attorney General and his designees have the task of assembling the necessary information and making recommendations to the Presidentthereupon, the decision of whom to nominate for such federal judgeships remains solely within the personal authority of the President.

4. One of the sources of information and advice gathered by the Attorney General and his designees for use in advising the President in the exercise of his sole constitutional nomination and appointment power is the evaluations of the qualifications of proposed judicial candidates by the ABA Committee on Federal Judiciary. The Attorney General considers the ABA evaluations in making his own recommendations to the President regarding potential nominees, and serves as a conduit for such evaluations to the President.

5. The ABA Committee is independent of the federal government and is not supported with federal funds.

6. The following is an outline of the role of the ABA Committee and its evaluations in the President's judicial nomination process.

7. Potential nominees for appointment to the judiciary are selected by the President's federal judicial selection committee made up of immediate advisers to the President, including the Attorney General; the Counsel to the President; the Deputy Attorney General; the Counselor to the Attorney General; the Assistant Attorney General, Office of Legal Policy, working with the Deputy Attorney General's office, notifies candidates of their selection, requests candidates to complete a Personal Data Questionnaire, and directs candidates to provide the information requested on that questionnaire to the Chairman of the ABA Committee, to the Committee's representative for the relevant federal circuit and to the Assistant Attorney General, Office of Legal Policy. The Assistant Attorney General requests the ABA Committee to undertake investigations and evaluations of the qualifications of the proposed nominees and to provide formal reports of the Committee to the Assistant Attorney General.

8. Pursuant to this authorization, the Assistant Attorney General, Office of Legal Policy, working with the Deputy Attorney General's office, notifies candidates of their selection, requests candidates to complete a Personal Data Questionnaire, and directs candidates to provide the information requested on that questionnaire to the Chairman of the ABA Committee, to the Committee's representative for the relevant federal circuit and to the Assistant Attorney General, Office of Legal Policy. The Assistant Attorney General requests the ABA Committee to undertake investigations and evaluations of the qualifications of the proposed nominees and to provide formal reports of the Committee to the Assistant Attorney General.

9. On occasion, after completion of an initial evaluation and report to the ABA Committee Chairman by the ABA Committee's designee conducting the investigation (usually the ABA Committee member in the circuit to which a proposed nomination relates), discussion concerning the results of the evaluation may occur, generally via telephone between the ABA Chairman and/or the investigating ABA Committee designee and Department of Justice officials, including the Assistant Attorney General, Office of Legal Policy or a Deputy Assistant Attorney General, Office of Legal Policy.

10. Upon completion of a final investigation report by the investigating designee and circulation of the report to the ABA Committee Chairman and members, a final rating of a proposed nominee is determined by the ABA Committee; and the Assistant Attorney General, Office of Legal Policy is then notified of that rating and whether it was supported by a majority, a substantial majority or unanimous vote of the ABA Committee.

11. The ABA Committee's ratings of proposed nominees are considered by the Attorney General along with other information, including investigation reports by the Federal Bureau of Investigation, candidates' financial declarations, and medical reports, in determining whether to recommend potential nominees to the President. If the net result of these considerations is positive, the Attorney General will recommend a candidate to the President, through a letter to the President which recites the ABA Committee's evaluation of the candidate.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 18 December 1986 /s/

STEVE A. MATTHEWS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
1705 N Street, N.W.)
Washington D.C. 20036,)
Plaintiff,)
and)
PUBLIC CITIZEN)
2000 P Street, N.W.)
Washington D.C. 20036,) Civil Action
) No. 86-2883
Plaintiff-Intervenor,) Judge Joyce Hens Green
v.)
DEPARTMENT OF)
JUSTICE)
10th & Pennsylvania)
Avenue, N.W.)
Washington D.C. 20530,)
Defendant.)

COMPLAINT OF PLAINTIFF-INTERVENOR PUBLIC CITIZEN FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action seeks declaratory and injunctive relief under the Federal Advisory Committee Act (the "FACA"), 5 U.S.C. App. I, and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 et seq., from defendant Department of Justice's utilization of the American Bar Association Standing Committee on the Federal Judiciary (the "ABA Committee") without complying with the requirements of the FACA.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PARTIES

3. Plaintiff-intervenor Public Citizen is a non-profit, public interest organization, which was founded by Ralph Nader in 1971 and which currently has a membership of approximately 70,000. One of Public Citizen's primary objectives is to increase government accountability through open government laws such as the FACA. In furtherance of this objective, Public Citizen engages in public education, lobbying, and litigation under the FACA. Public Citizen has participated in manyof the most significant cases that have been litigated under the FACA, and its effectiveness in many areas is dependent on its access to advisory committees and their documents. Public Citizen also has a significant interest in the federal judiciary, and the process by which federal judges are chosen, because it regularly brings cases in the federal courts on behalf of itself and others.

4. Defendant Department of Justice is an agency of the United States within the meaning of 5 U.S.C. § 551(1) and 5 U.S.C. App. I, § 3(3). It has utilized and continues to utilize the ABA Committee in the interest of obtaining advice and recommendations on the professional qualifications of persons under consideration for nomination to the federal courts.

FACTS

5. Since 1948, the Department of Justice has regularly utilized, and it continues to utilize, advice from the ABA Committee on the professional qualifications of potential nominees for federal judiciary positions.

6. The Justice Department initiates the advisory process by forwarding to the ABA Committee the names of possible nominees for federal judicial posts. The ABA Committee undertakes investigations and evaluations of prospective judicial nominees in order to advise the Department of Justice on the candidates' suitability for judicial positions. After it has concluded its evaluation, the ABA Committee assigns one of four ratings to the candidate: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." The ABA Committee informs the Justice Department of the rating assigned to each candidate.

7. The Department of Justice then utilizes the ABA Committee's evaluations and ratings in deciding whether to recommend potential nominees to the President.

CAUSE OF ACTION

8. The ABA Committee is a federal advisory committee as that term is defined in section 3(2) of the FACA, because defendant Department of Justice is, and has been, utilizing it in the interest of obtaining advice and/or recommendations.

9. Public Citizen wishes to gain access to more information regarding the ABA Committee, including the role assigned to the Committee by the Justice Department and the general criteria and procedures used by the Committee in evaluating possible judicial nominees, butsuch information is not currently available to Public Citizen because the Justice Department is not complying with the FACA.

10. The Justice Department has not complied with any of the FACA's requirements in its utilization of the ABA Committee as an advisory committee, and it will not comply with the FACA's requirements in the future unless ordered to do so by this Court.

WHEREFORE, plaintiff prays that this Court enter an order:

(a) declaring that the Justice Department's utilization of the ABA Committee is covered by the FACA, and ordering the Department of Justice to comply with the FACA's requirements when it utilizes the ABA Committee in the future;

(b) awarding plaintiff-intervenor its costs and disbursements, including reasonable attorneys' fees, in this action; and

(c) granting plaintiff-intervenor such other and further relief as the Court deems proper.

Respectfully submitted,
/s/
Eric R. Glitzenstein
(D.C. Bar No. 358287)
/s/
Patti A. Goldman
(D.C. Bar No. 073114)
Public Citizen
Litigation
Group
Suite 700
2000 P Street, N.W.

Washington, D.C. 20036
(202) 785-3704

Attorneys for Plaintiff-
Intervenor Public Citizen

Dated: February 4, 1987

Plaintiff's Exhibit A
Civ. No. 86-2883

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
DEPARTMENT OF)
JUSTICE,)
Defendant.)

AFFIDAVIT OF JOAN CLAYBROOK

I, Joan Claybrook, hereby declare as follows:

1. I am the President of Public Citizen. I am submitting this affidavit in support of Public Citizen's Motion to Intervene in the above-captioned lawsuit.

2. Public Citizen is a non-profit, public interest organization, which was founded by Ralph Nader in 1971. It currently has a membership of approximately 70,000.

3. One of Public Citizen's primary objectives is to increase government accountability through open government laws. In furtherance of this objective, Public Citizen engages in public education, lobbying, and litigation under the Freedom of Information Act, the Government in the Sunshine Act, the Privacy Act, and the Federal Advisory Committee Act.

4. Public Citizen's efforts to improve the federal advisory committee process predate the enactment of the Federal Advisory Committee Act ("FACA"). In 1971, Ralph Nader, former President of Public Citizen, testified before the Senate Subcommittee on Intergovernmental Relations about the need for regulation of the federal advisory committee process.

5. Since the enactment of FACA, Public Citizen has monitored the Act's implementation and served as a resource on FACA developments. For example, in 1974-1975, Public Citizen Litigation Group undertook a joint project with the Freedom of Information Clearinghouse to examine the problems and issues that have arisen in the early years of FACA, which led to a law review article. B. Tuerkheimer, Veto by Neglect: The Federal Advisory Committee Act, 25 American University Law Review 53 (1975). Similarly, Eric R. Glitzenstein, a staff attorney with Public Citizen Litigation Group, is currently a member of the Federal Bar Association Select Committee on the Federal Advisory Committee Act.

6. Public Citizen has also sought to challenge noncompliance with FACA and to improve the Act's implementation through the courts. Public Citizen's most recent such endeavor was its 1985 lawsuit to subject the Bicentennial Commission to FACA's open meeting requirements. Public Citizen v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 953 (D.D.C. 1985). Aside from the lawsuits that Public Citizen has brought on its own behalf, Public Citizen attorneys have litigated many of the most pivotal FACA cases. See, e.g., National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983); Wolfe v. Weinberger, 403 F. Supp. 238 (D.D.C. 1975); Food Chemical News v. Davis, 378 F. Supp. 1048 (D.D.C. 1974); Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975); Nader v. Dunlop, 370 F. Supp. 177 (D.D.C. 1973).

7. In its work in other areas, Public Citizen is affected by the substantive recommendations of advisory committees. Thus, Public Citizen's effectiveness is often dependent upon its access to advisory committee meetings and documents. For example, Public Citizen recently submitted comments to the Food and Drug Administration's Arthritis Advisory Committee on acute renal failure from the arthritis drug Suprofen. Similarly, Public Citizen has sought access to the documents from the advisory committee that recommended pay increases for congressional representatives, judges, and executive officials as part its involvement in that issue.

8. Public Citizen seeks to intervene in this case in part because the government is urging a very restrictive interpretation of FACA. In particular, the government has put forward a constitutional argument that seeks to limit FACA's applicability to advisory committees that are utilized by the President. If this Court accepts the government's argument, it would have a serious, detrimental impact on the public's rights of access to, and input into, the operation of federal advisory committees.

9. Aside from its interest in FACA, Public Citizen seeks to intervene in this case to protect its significant interest in the federal judiciary. Public Citizen regularly resorts to the federal courts to further the interests of its members. Since 1972, Public Citizen Litigation Group, which currently has a staff of ten lawyers, has been litigating groundbreaking cases in the federal courts. Thus, the criteria and methods used to select federal judges have far-reaching effects on Public Citizen's work.

10. Public Citizen's interests will not be represented by either party to this lawsuit. The government will not represent Public Citizen's interests because it seeks to limit the coverage of FACA in a way that is almost certain to damage our interests in the statutory scheme and in advisory committees. The Washington Legal Foundation will not represent Public Citizen's interests because it seeks more sweeping relief than what we believe is appropriate at this juncture and because its motivation for this lawsuit apparently stems from what it perceives to be an overly "liberal" bias in the utilization of the ABA Standing Committee on the Federal Judiciary.

Pursuant to 28 U.S.C. § 1746 and Local Rule 106(g), I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of February, 1987.

/s/
Joan Claybrook

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION,)
Plaintiff,)
v.) Civil Action No. 86-2883
) (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE,)
Defendant.)

PLAINTIFF-INTERVENOR'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

In support of plaintiff-intervenor's motion for summary judgment, and inaccordance with Local Rule 1-9(i), plaintiff-intervenor submits that no genuine issue exists as to the following material facts:

1. The Justice Department routinely provides the American Bar Association's Standing Committee on the Federal Judiciary (the "ABA Committtee") with the names of possible nominees for federal judgships and asks the ABA Committee to evaluate the qualifications of those nominees. Washington Legal Foundation v. American Bar Association, Civ. No. 85-3918, slip op. at 2 (D.D.C. Nov. 26, 1986).

2. The Justice Department does not make the names of possible nominees for federal judgships available to the general public.

3. The Justice Department does not ask any outside committees other than the ABA Committee to evaluate the qualifications of possible nominees for federal judgships.

4. The Justice Department utilizes the evaluations prepared by the ABA Committee in making its own recommendations to the President regarding possible nominees for federal judgships. Affidavit of Steven A. Mathews at ¶¶ 4, 11.

5. The Justice Department and the President utilize the recommendations and evaluations of the ABA Committee in determining whether to nominate individuals for federal judgships. Mathews Affidavit at ¶11.

6. After an individual is nominated to be a federal judge, the ABA Committee's rating regarding that individual is made available to the public.

Respectfully submitted,

\s\
Eric R. Glitzenstein
D.C. Bar No. 358287
Alan B. Morrison
D.C. Bar No. 073114
Patti goldman
D.C. Bar No. 398565

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

February 4, 1987

Attorneys for Plaintiff-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)
)

[PROPOSED ORDER for Public Citizen's
Motion for Summary Judgment]

This matter is before the Court on defendant's motion to dismiss and plaintiff-intervenor's motion for summary judgment. Upon consideration of the parties' arguments and memoranda, as well as the record in the case, it is, by the Court, this day of , 1987

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that plaintiff-intervenor's motion for summary judgment is granted; and it is further

ORDERED that it is DECLARED that the defendant Justice Department utilization of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") is covered by the Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"), and that the defendant Department of Justice must undertake to comply with the requirements of FACA when it utilizes the ABA Committee in the future.

U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Since the Court may treat defendant's pending motion as one for summary judgment (see F.R.Civ.Pro. 12(b)), and in accordance with Local Rule 108(h), defendant submits that no genuine issue exists as to the following material facts:

1. In fulfilling his Article II authority to nominate candidates for federal Article III judgeships, the President relies upon advice and information from private citizens, government agencies and public officials, including the Attorney General and his designees who provide such advice, information and assistance to the President as the President deems necessary. See Declaration of Steve A. Mathews ¶¶2, 3.

2. The American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") provides advice and information on the qualifications of potential judicial nominees for use by the Attorney General and the President. Id. at ¶¶4, 8-11; see also WLF v. ABA, No. 85-3918, slip. op. at 103 (D.D.C. Nov. 26, 1986).

3. As part of the President's nomination process, the President's federal judicial selection committee, made up of immediate advisors to the President, identifies potential candidates for nomination and authorizes a request to the ABA Committee to evaluate the qualifications of proposed judicial candidates. Mathews Dec. ¶¶2-4, 7-8.

4. The ABA evaluation generally consists of "confidential interviews with lawyers, judges, and professors in the nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications." WLF v. ABA, supra, slip. op. at 2.

5. After the investigation is completed, the committee determines a final rating on qualifications and forwards that rating to the Assistant Attorney General, Office of Legal Policy. Mathews Dec. ¶10.

6. The contents of the ABA Committee's report remain confidential. WLF v. ABA, supra, slip. op. at 2

7. The Attorney General considers the ABA evaluations in making his own recommendations to the President regarding potential nominees, and provides the ABA Committee's rating to the President, upon the Attorney General's decision to recommend a candidate. Mathews Dec. ¶¶4, 11.

8. After receiving the necessary information and recommendations, the President makes the decision as to whom to nominate. See Mathews Dec. ¶3.

Respectfully submitted,
RICHARD K. WILLARD
Assistant Attorney General
JOSEPH diGENOVA
United States Attorney
/s/
ROBERT J. CYNKAR
Deputy Assistant Attorney General
/s/
DAVID J. ANDERSON
/s/
LINDA LANCE
/s/
CHARLES W. SORENSON, JR.
Attorneys, Department of Justice
Civil Division - Room 3326
10th & Pennsylvania Ave.,N.W.
Washington, D.C. 20530
202-633-2809

Attorneys for Defendant

[Certificate of Service omitted from printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Plaintiff-Intervenor,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
)
Defendant.)

PLAINTIFF-INTERVENOR'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

In accordance with Local Rule 108(h), plaintiff-intervenor Public Citizen responds to defendant's statement of material facts as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Plaintiff-Intervenor is without sufficient information to admit or deny the facts in this paragraph but submits that they are not material to resolution of this dispute.

5. Admitted.

6. Plaintiff-Intervenor is without sufficient information to admit or deny the facts in this paragraph but submits that they are not material to resolution of this dispute.

7. Admitted.

8. Plaintiff-Intervenor is without sufficient information to admit or deny whether President actually makes the decision as to whom to nominate but submits that this fact is not material to resolution of this dispute.

Respectfully submitted,
/s/
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Attorney for Plaintiff-Intervenor

Dated: April 6, 1987

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Intervenor-Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)
)

PLAINTIFF'S CONDITIONAL RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

On March 25, 1987, defendant Department of Justice filed its Opposition to Plaintiff-Intervenor's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss. Although the defendant has not filed a motion for summary judgment, it nevertheless filed, also on March 25, 1987, a Statement of Material Facts As To Which There Is No Genuine Dispute on the contingency that the Court may treat its motion to dismiss, filed on December 22, 1986, as a motion for summary judgment. See F.R.Civ.Pro. 12(b). While the Court has not indicated whether or not it will treat defendant's motion to dismiss as one for summary judgment, the plaintiff nevertheless files this response to the defendant's Statement of Material Facts for the Court's consideration should the Court decide to convert the motion to dismiss into one for summary judgment.

If the Court so decides to treat the defendant's motion to dismiss as one for summary judgment, we request that the Court notify the parties of that decision so that the plaintiff can obtain discovery and provide record evidence before a ruling on the motion is made. See F.R.Civ.Pro. 12(b), 56. In that regard, plaintiff is filing herewith a Rule 56(f) affidavit on a conditional basis as well.

Accordingly, Washington Legal Foundation responds to defendant's statement of material facts as follows:

1. Admit that the President relies on the advice of the Attorney General in nominating federal judges. Plaintiff is without sufficient information to admit or deny that the President also relies on advice from private citizens and other government agencies and officials or that the advice from the Attorney General and his designees is advice that "the President deems necessary" in exercising his Article II nominating authority. Further, plaintiff denies any implication in this statement that the President has directly solicited the advice of the ABA, or the implication that the President "deems necessary" that advice of the ABA be given to the Attorney General.

Plaintiff further challenges under F.R.Civ.Pro. 56(e) the competency of the declarant Steve A. Matthews, a Deputy Assistant Attorney General within the Office of Legal Policy of the Department of Justice, to testify "on personal knowledge" as required by Rule 56(e) as to what advice the President "deems necessary" to carry out his Article II powers. Accordingly, ¶¶2-3 of the Matthews Declaration must be stricken as incompetent and inadmissible evidence under Rule 56(e), leaving ¶1 of the Defendant's Statement of Material Facts largely without any support in the record.

2. Admit, except that plaintiff submits that the ABA Committee is a preferred source of advice and information to the Attorney General on the qualifications of potential judicial nominees. In addition, the ABA Committee supports or opposes potential nominees. Plaintiff's Complaint ¶14; see Letter of Edward C. Schmults, former Deputy Attorney General, in Wall Street Journal, Jan. 8, 1986 referred to in Plaintiff's Opposition to Motion to Dismiss at 9, n.6.

Plaintiff further submits that with respect to potential nominees who have been initially reviewed and appear "not qualified" under ABA standards, the ABA Committee's advice, information, and recommendations on such candidates are only used by the Attorney General and are never received or reviewed by the President. See also Defendant's Opposition and Reply Brief at 5 ("the President...generally receives the ABA's recommendation on that issue") (Emphasis added).

3. Admit, except that plaintiff denies that some members of the so-called "President's federal judicial selection committee" is entirely "made up of immediate advisors to the President" as alleged. For example, a Deputy Assistant Attorney General of the Office of Legal Policy within the Justice Department who is listed as being on the committee can hardly be characterized as an "immediate advisor" to the President of the United States. Plaintiff is aware of no Executive Order or similar directive establishing this Presidential committee as there has been of other Presidential committees of an advisory nature.

4. Admit, except that the investigation conducted by the ABA has not been limited to only individuals within the "nominee's community" but has included select individuals and groups outside the community which are national in scope and which are hostile to conservative nominees. Plaintiff's Complaint ¶¶9, 10. Further, the investigation consists not only of the nominee's "qualifications" but also includes highly improper subjects such as the potential nominee's religious beliefs.

In addition, plaintiff denies any implication that all the interviews are strictly "confidential" since the information or views revealed by a source and the reasons for the evaluation rating is selectively released by the ABA Committee to Justice Department officials and other private and public individuals. See ABA Standing Committee on Federal Judiciary: What It Is and How it Works at 9 (1983) ("ABA Committee...makes an extensive report [to the Senate Judiciary Committee on Supreme Court nominees] on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources."); id. at 10 (confidentiality" with respect to the investigation of all potential nominees refers only to the "identities" of "sources" and not the underlying information obtained by the ABA from those sources). See Exhibit A attached hereto.

5. Admit, except that as indicated in ¶9 of the Matthews Declaration, ABA Committee advice, information, and recommendations are sometimes given to DOJ officials before a "final rating" of the candidate is made by the entire ABA Committee. In some cases, a "final rating" by the entire Committee of a potential nominee is never made because the preliminary rating and advice has resulted in the potential nominee's removal from further consideration.

6. Plaintiff is without information to admit or deny the statement in ¶6 since the phrase "ABA Committee's report" is undefined. If the "ABA Committee's report" consists of only the "final rating" referred to in ¶5 of defendant's statement, then plaintiff denies the statement that the rating does "remain confidential" as alleged, because it is publicly released when the nomination is made. Furthermore, as noted in plaintiff's response to ¶4 of Defendant's Statement of Material Facts, additional information concerning the ABA investigation is also selectively released by the ABA Committee.

7. Admit, except that it is unclear whether the President receives the ABA rating in all cases since, as noted in our response to ¶2, the defendant states only that the President "generally" receives the ABA recommendation.

8. Admit that the President technically makes the nomination, but without information to admit or deny whether "the President makes the decision as to whom to nominate" to the extent that the phrase "as to whom" suggests that the name of more than one potential nominee is given to the President from which the nominee is chosen. See ¶7 of Defendant's Statement of Material Facts which only refers to the "Attorney General's decision to recommend a candidate." (Emphasis added). In other words, the President's decision may only be limited to deciding whether to accept or reject the sole nominee given to the President by the Attorney General for a particular judicial post. Thus, if only one name is given to the President for a judicial post and if the President invariably nominates that person, this "decision as to whom to nominate" effectively lies with the Attorney General who, in turn, utilizes the ABA Committee as a preferred source of advice in making his decision.

Significantly, the defendant does not claim in its Statement of Material Facts nor in the Matthews Declaration that declaratory or injunctive relief in favor of the plaintiff would result in any disruption of the judicial nominating process or would interfere in any way with the President's Article II authority. Those vague and unspecific fears have been made only by defendant's counsel in its legal memoranda, but have never been established as fact or supported by any affidavit or other record evidence.

Respectfully submitted,

/s/ DANIEL J. POPEO
/s/ PAUL D. KAMENAR
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[Exhibit A to Plaintiff's Conditional Response
to Defendant's Statement of Material Facts]

STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works
AMERICAN BAR ASSOCIATION
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Printed February 1983

THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works

The Standing Committee on Federal Judiciary of the American Bar Association has been consulted by every President with respect to almost every federal judicial appointment since 1952. Moreover, the U.S. Senate through the Senate Judiciary Committee has requested the opinion of the Committee on every federal judicial nomination since 1948.

The Committee never proposes candidates for the federal judiciary, believing that to do so might compromise its evaluative function. Rather, it considers prospective nominees referred to it by the Attorney General. Further, the Committee restricts its review primarily to issues bearing on professional qualifications. Other entities such as nominating commissions, the President, and the Senate may consider other aspects of the prospective nominee's qualifications.

The Committee evaluates the qualifications of persons considered for appointment to the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Court of International Trade. For historical and practical reasons, the Committee's procedures for appointments to the Courts of Appeals, the District Courts, and the other lower federal courts differ from those for Supreme Court nominations and therefore are dealt with separately below.

The Committee consists of fourteen members--two members from the Ninth Circuit, one member from each of the other eleven federal judicial circuits and one member-at-large. The members are appointed for staggered three-year terms by the

President of the ABA. No member serves more than two terms. As a condition of appointment to the Committee, each member agrees not to seek or accept federal judicial appointment while on the Committee and for at least one year thereafter.

I. APPOINTMENTS TO THE DISTRICT COURTS, THE COURTS OF APPEALS AND THE OTHER LOWER FEDERAL COURTS

There are approximately forty vacancies on the Courts of Appeals, the District Courts and the other lower federal courts each year. Though not highly publicized outside the legal profession, the Committee's evaluation of prospective nominees for these courts provides its regular work load.

A. Evaluation Criteria

The Committee's evaluation of prospective nominees to these courts is directed primarily to professional qualifications --competence, integrity and judicial temperament.

In assessing a prospective nominee's professional qualifications, the Committee considers circumstances and factors which range so widely that it would be difficult to provide a comprehensive catalogue. Professional competence encompasses such qualities as intellectual capacity, judgment, writing ans analytical ability, industry, knowledge of the law and professional experience.

As to experience, the Committee believes that ordinarily a prospective appointee to the federal bench should have been admitted to the bar for at least twelve years. Substantial trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate courts and the trial courts. Additional experience which is similar to court trial work--such as appearing before or serving on administrative agencies or arbitration boards, teaching trial advocacy or other clinical law school courses, etc.--is considered in evaluating a prospective nominee's trial experience qualifications. In exceptional cases, when there is significant evidence of distinguished accomplishment in the field of law, an individual with limited trial experience may be found qualified.

In evaluating experience, the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited.

The Committee believes that political activity and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law.

In investigating temperament, the Committee looks to the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors. The prospective nominee's character, integrity and general reputation in the legal community are investigated, as are his or her industry and diligence. Community and professional contributions are considered relevant. Finally, the prospective nominee's health and age are considered. The Committee believes that the public is entitled to the appointment to the federal judiciary of persons who are able to render long and vigorous service. The Committee does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.

The Committee feels that the same fundamental criteria--professional competence, integrity and temperament--should be applied as a starting point for evaluating prospective nominees for the appellate courts and for the trial courts. However, the Committee also believes that an appellate judge should have an unusual degree of overall excellence that would provide an inspiration and an example to trial judges. Without demeaning the scholarly qualities necessary for the trial courts, the Committee nonetheless looks for an especially high degree of scholarship and academic talent in prospective nominees for the appellate courts. The abilities to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases are matters of great concern in the evaluation of prospective nominees for the appellate courts.

Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom), the Committee may place somewhat less emphasis on the importance of extensive trial experience as a qualification for the appellate courts. This same contrast in day-to-day experience may also cause the Committee to evaluate temperament for the appellate courts in slightly different terms.

B. Ratings

The Committee rates prospective nominees on the following scale:

To be rated **Exceptionally Well Qualified**, the prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament inaddition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made important community and professional contributions in order to merit the sparingly awarded "Exceptionally Well Qualified" evaluation.

To be **Well Qualified**, the prospective nominee must have the Committee's strong affirmative endorsement and be regarded as one of the best available for the vacancy from the standpoint of competence, integrity and temperament.

The evaluation of **Qualified** indicates that it appears the prospective nominee would be able to perform satisfactorily as a federal judge with respect to competence, integrity and temperament.

When a prospective nominee is found **Not Qualified**, it means that the Committee's investigation indicates that the prospective nominee is not adequate from the standpoint of competence, integrity or temperament.

C. The Investigation

After a judicial vacancy occurs and prior to any nomination to that vacancy, the Chairman of the Committee receives one or more names of prospective nominees for evaluation from the office of the Attorney General. The investigation of the prospective nominee is usually assigned to the circuit member of the Committee in the judicial circuit in which the judicial vacancy exists, although it may be conducted by another member, a former member or a former chairman. (The individual making the investigation is hereinafter referred to as the "circuit member.")

To each prospective nominee the Attorney General's office sends a comprehensive ABA-designed questionnaire (called a Personal Data Questionnaire) that seeks wide-ranging information related to fitness for judicial service. The responses are sent to the U.S. Department of Justice, the ABA Committee Chairman and the circuit member. Receipt of this document is usually the starting point for the investigation. The circuit member makes extensive use of it in his or her investigation. The prompt, thorough and accurate preparation of a response to the Personal Data Questionnaire by the prospective nominee is extremely important to the investigation.

The circuit member examines the available legal writings of the prospective nominee and conducts a large number of confidential interviews with judges, lawyers, law professors and others who are in a position to evaluate the prospective nominee's competence, integrityand temperament. The circuit member interviews a representative sample of the profession in the community, including attorneys from different sized offices, attorneys who practice in different fields of law, law professors and deans, judges of different courts, government attorneys, legal services and public interest attorneys, women attorneys and attorneys who are members of various minority groups. Spokespersons of professional organizations including those representing women and minorities are also contacted. In addition, representatives of groups involved in the selection or evaluation of prospective nominees for the federal judiciary are interviewed.

Sometimes a clear pattern emerges early in the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations as to competence may be received, or questions may arise as to integrity or temperament. In those instances, the circuit member pursues the leads and problems as necessary to reach a fair and accurate assessment of the prospective nominee. This may involve a large number of interviews and other investigations. For example, the examination of trial transcripts and other relevant records.

A meeting of the circuit member, and in appropriate cases one or more other members of the Committee, is held with the prospective nominee. During the interview the circuit member raises any adverse information discovered during the investigation and discusses it with the prospective nominee. The prospective nominee is given a full opportunity to explain the matter and to provide any additional information bearing on it. The circuit member also discusses with the prospective nominee his or her qualifications for a judgeship. The circuit member may need to conduct additional interviews in order to complete this stage of the investigation.

The circuit member then prepares a written informal report to the Chairman containing a description of the prospective nominee's background, summaries of all interviews conducted including the interview with the prospective nominee, an evaluation of the prospective nominee's qualifications and a recommended rating after receiving the report and discussing it with the circuit member, the Chairman makes an informal report to the Attorney General's office. While protecting the confidentiality of those interviewed, the Chairman passes on the substance of the report and gives a tentative evaluation--indicating that, if a formal report is requested, the prospective nominee will probably be found "Exceptionally Well Qualified," "Well Qualified," "Qualified" or "Not Qualified."

If the office of the Attorney General requests the Committee to prepare a formal or final report, the circuit member completes the investigation as necessary. The circuit member then sends a written formal report to all members of the Committee together with the response to the Personal Data Questionnaire and any other materials thought relevant by the circuit member. After studying the formal report and its enclosures, each member sends a vote to the Chairman. If questions are raised, the Committee may discuss the prospective nominee by telephone conference call or at a meeting.

The Chairman confidentially reports the Committee's rating to the office of the Attorney General. If the Committee has been unanimous in its rating, the report so states. Otherwise the report reflects the rating given by a majority or substantial majority of the Committee. If questions concerning the health of the prospective nominee have been raised during the investigation, the Committee's rating may be conditioned upon the prospective nominee's undergoing an independent medical examination.

If the President nominates the prospective nominee, a public hearing is held by the Senate Judiciary Committee as the beginning of the confirmation process. At the request of the Senate Judiciary Committee, the ABA Committee submits its rating for the public record and at the same time notifies the nominee of its rating. Until this state of the process, the Committee does not make its rating public unless authorized to do so by the Attorney General.

If the Committee has found a prospective nominee "Not Qualified," the question arises whether the President will nominate the prospective nominee. Only in rare instances--less than 1 percent of the nominations--has a President decided to nominate a person found "Not Qualified" by the Committee. In those circumstances, the Committee will oppose the nomination in such ways as may be appropriate under the circumstances.

II. APPOINTMENTS TO THE SUPREME COURT

It is extremely important to the Committee's effective evaluation of prospective Supreme Court nominees that it be given sufficient time to evaluate them in depth. The procedures described below have been followed recently and have allowed the Committee to afford significant assistance to the President in selecting a well-qualified appointee.

A. Evaluation Criteria and Ratings

The Committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications--their professional competence, judicial temperament and integrity. Whilethe same factors considered with respect to the lower federal courts are relevant to an appointment to the

Supreme Court, the Committee's investigation is based on the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice, it is not enough that one be a fine person or a good lawyer.

The Committee's highest evaluation of a prospective nominee to the Supreme Court--Well Qualified--is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment to the Supreme Court.

The second category consists of those persons who are Not Opposed by the Committee. Such a person, while minimally qualified, is among the best available for the appointment and is not endorsed by the Committee.

The third category consists of those who are **Not Qualified** with respect to professional qualifications for appointment to the Supreme Court.

B. The Investigation

The Committee's procedures in evaluating a prospective nominee are described below.

1. Members of the Committee across the nation interview those likely to have information regarding the professional competence, integrity and temperament of the person under consideration. Those interviewed include federal and state court judges and their law clerks, a cross-section of practicing lawyers, government lawyers, legal services and public interest lawyers, law school professors and deans, officials of professional organizations and spokespersons representing women, minorities, the indigent, ethnic groups and other interest groups.

2. A team of law school professors examines the legal writing (opinions, briefs and articles) of the prospective nominee. Customarily, this task is accomplished by dividing the material

into subject matter categories and having it read by professors who are expert in those areas. The law school teams are usually under the direction of a senior professor who reports the findings to the Committee. This aspect of the investigation, like the investigation as a whole, is intended to weigh professional competence, not to assessthe ideology of the prospective nominee.

3. A team of practicing lawyers (which may include former Supreme Court law clerks) also examines the legal writings of the prospective nominee as a valuable cross-check on the academic evaluation.

4. Committee members discuss the prospective nominee with a number of the most highly respected law school deans and with the Chief Judges of the Circuits and other judges.

The results of the foregoing inquiries, together with the results of comparable investigations of other prospective nominees, are reported to the full Committee for discussion and evaluation. These sessions are lengthy and searching and frequently result in additional investigation.

The Committee's ratings of prospective nominees are reported in confidence to the Attorney General. Further evaluation and reports may be provided as the President approaches a choice.

Once the President has made a nomination, the Senate Judiciary Committee holds confirmation hearings. At the Senate Judiciary Committee's hearings, a spokesperson for the ABA Committee appears and makes an extensive report on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources. The Committee may submit a follow-up report to the Senate Judiciary Committee or to the Senate as a whole if new information is developed during the course of the hearing which warrants comment or evaluation by the ABA Committee.

III. CONFIDENTIALITY

A persistent concern of the Committee in connection with its investigation of prospective nominees is confidentiality. This is particularly true with respect to Supreme Court appointments. A Supreme Court nomination is an event of substantial national interest, and from the moment the vacancy occurs, many of the nation's most able reporters are assigned to it.

The Committee seeks information on a confidential basis. No member of the Committee discloses the name of anyone under investigation except to those being interviewed or assisting in the investigation, who are asked to keep the information confidential. It is, however, inevitable that an extensive investigation will result in public identification of the prospective nominee. Such public knowledge is usually not harmful and may be beneficial in some circumstances in that itencourages investigation into the background and personal history of the prospective nominee by other persons. It is in the public interest to avoid an appointment without full information about the appointee.

Public disclosure of the Committee's evaluation prior to its report to the Senate Judiciary Committee after the nomination has been made is more serious. The nomination process is a Presidential function, and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination. Moreover, prospective nominees not ultimately nominated should be spared any embarrassment resulting from the Committee's evaluations.

In investigations involving both the Supreme Court and the other federal courts, it is essential that the Committee assure its sources that their identities will not be revealed outside of the Committee. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information.

IV. CONCLUSION

Through the cooperation of the executive and legislative branches of our government, the ABA's Standing Committee on Federal Judiciary has been able to play a useful role in helping to promote a better federal judiciary. The Committee constantly seeks to learn from its experiences and to refine and improve its standards and procedures. To this end, the Committee welcomes suggestions from members of the bar and the public.

[List of Members of ABA Committee omitted from printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Intervenor-Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)
)

AFFIDAVIT OF PLAINTIFF PURSUANT TO F.R.CIV.PRO. 56(f)

I, Paul D. Kamenar, do declare and say as follows:

1. I am the Executive Legal Director of the Washington Legal Foundation, the plaintiff in this case. I submit this affidavit pursuant to F.R.Civ.Pro. 56(f) should the Court decide to convert the defendant's motion to dismiss to one for summary judgment under F.R.Civ.Pro. 12(b). Under Rule 56(f), the Court can either "refuse the application for [summary] judgment *or* may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or* may make such other order as is just." F.R.Civ.Pro. 56(f) (emphasis added). While we submit that there is more than ample grounds to refuse or deny the defendant's converted motion, we request, in the alternative, a continuance to permit discovery to be had for the following reasons:

2. To the extent that the defendant (or this Court) regards it to be a material fact in ¶1 of Defendant's Statement of Material Facts that the President "deems necessary" that the Attorney General receive the advice of the American Bar Association, or any implication that the application of all or part of the Federal Advisory Committee Act to the ABA would prevent

the Attorney General from receiving the ABA's advice, plaintiff is unable to oppose this statement without taking discovery of the defendant who is in possession of this information, including the declarant Steve A. Matthews. Such discovery is needed to determine and rebut the factual basis for this position.

3. To the extent that it is a material fact in ¶¶4 and 6 of defendant's Statement that the ABA's investigation and evaluation is or remains "confidential," or any implication that such confidentiality is essential to the nominating process, plaintiff is unable to fully oppose this statement without discovery of the defendant and/or the ABA Committee to determine and rebut the factual basis for this assertion. As noted in ¶4 of Plaintiff's Response to Defendant's Material Facts, the ABA considers "confidentiality" to refer only to the sources of information and not the underlying information obtained from the source, suggesting that there may be no incompatibility of the Federal Advisory Committee Act with the ABA evaluation process.

4. To the extent that other facts in defendant's Statement are material which plaintiff indicated it was unable to admit or deny, the information concerning the factual basis of those assertions are largely in the hands of the defendant.

5. While plaintiff is prepared to take discovery of the defendant, the ABA Committee, and others, plaintiff is reluctant to do so at this juncture since the Court may feel it can decide the pending motions without any discovery. In addition, when plaintiff attempted to take discovery in the earlier related case, Washington Legal Foundation v. American Bar Association, No. 85-3918 (D.D.C. Nov. 26, 1986), this Court stayed all discovery because "[d]iscovery at this point in the proceedings [was] premature." See WLF v. ABA, supra, Order of February 3, 1986.

6. Accordingly, should the Court convert the government's motion to dismiss into one for summary judgment, the motion should be denied, or, in the alternative, a continuance should be ordered so discovery may be had.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 30, 1987

/s/
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[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Intervenor-Plaintiff,)
v.) Civil Action No.
) 86-2883-JHG
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)
)

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In accordance with Local Rule 108(h), plaintiff submits that no genuine issue exists as to the following facts:

1. The Justice Department routinely provides the American Bar Association's Standing Committee on Federal Judiciary (the "ABA Committee") with the names of possible nominees for federal judgeships and asks the ABA Committee for its advice on the suitability and qualifications of those nominees. See The ABA's Standing Committee on Federal Judiciary: What It Is and How It Works 1 (1983) ("ABA Brochure").

2. The Justice Department does not make the names of possible nominees for federal judgeships available to the general public.

3. The Justice Department does not ask any outside committees other than the ABA Committee for advice on the suitability and qualifications of possible nominees for federal judgeships.

4. As an integral part of the judicial selection process, the Justice Department requires all applicants for federal judgeships to complete a Personal Data Questionnaire which

was designed by the ABA Committee. See ABA Brochure at 5.

5. The Justice Department utilizes the advice of the ABA Committee in making its own recommendations to the President regarding possible nominees for federal judgeships. Affidavit of Steven A. Matthews at ¶¶4, 11.

6. If the ABA Committee advises the Department of Justice that a nominee is "not qualified," that evaluation almost always results in the removal of that nominee by the Justice Department from further consideration. See ABA Brochure at 7.

7. The Justice Department utilizes the recommendations and evaluations of the ABA Committee in determining whether individuals for federal judgeships should be nominated. Matthes Affidavit at ¶11.

8. After an individual is nominated to be a federal judge, the ABA Committee's rating regarding that individual is made available to the public.

9. The reasons for the ABA Committee's rating and other information obtained during the course of the ABA Committee's investigation of a potential nominee is not always strictly confidential, but is sometimes revealed to the Department of Justice, the Senate Judiciary Committee, or other individuals. See ABA Brochure at 9-10.

10. The names of the potential nominees have been given by the ABA Committee to various individuals, groups, and organizations before the ABA Committee has completed its evaluation of those nominees. See Correspondence between WLF and ABA Committee Chairman Robert Fiske, Jr. attached as Exhibits A-D of Plaintiff's Complaint.

Respectfully submitted,
/s/
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/s/
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(202) 857-0240

Date: May 12, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Intervenor-Plaintiff,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)
)

[PROPOSED ORDER for Washington Legal Foundation's Alternative Motion for Summary Judgment]

This matter is before the Court on defendant's motion to dismiss which the court has converted into a motion for summary judgment, and plaintiff and plaintiff-intervenor's cross-motions for summary judgment. Upon consideration of the parties' arguments and memoranda, as well as the record in the case, it is, by the Court, this ___ day of ___, 1987

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff and plaintiff-intervenor's cross motions for summary judgment are granted; and it is further

ORDERED that it is DECLARED that the defendant Justice Department utilization of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") is covered by the Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"), and that the defendant Department of Justice must undertake to comply with the requirements of FACA when it utilizes the ABA Committee in the future.

____
U.S. District Judge

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION)
Plaintiff,)
and)
PUBLIC CITIZEN)
Intervenor-Plaintiff ,)
v.) Civil Action No.
) 86-2883-JHG
UNITED STATES)
DEPARTMENT OF)
JUSTICE)
Defendant.)

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

In accordance with Local Rule 108(h), defendant submits the following response to plaintiff's statement of material facts filed with the Court on May 12, 1987. In so responding the defendant does not concede the materiality of any of plaintiff's statements, or that plaintiff has complied with the requirements of Fed.R.Civ.Pro. 56 and Local Rule 108(h) with regard to record support of those statements.

1. Admitted. Defendant refers the Court to the December 18, 1986 Declaration of Steve A Matthews ¶¶ 3-8 (filed with defendant's December 22, 1986 Motion to Dismiss) for details regarding the request for ABA Committee evaluation of qualifications of potential candidates for Article III federal judgeships.

2. Admitted.

3. Admitted.

4. Defendant admits paragraph 4 to the extent that the potential nominee for Article III federal judgeships are re-

quested to complete a Personal Data Questionnaire (see Matthews Dec. ¶¶2, 8) which was designed by the ABA.

5. Defendant admits paragraph 5 to the extent that it is consistent with the cited Matthews Declaration which indicates that the ABA Committee's evaluations are considered by the Attorney General in making his own recommendations to the President regarding potential judicial nominees, and are provided to the President upon a determination by the Attorney General to recommend particular candidates to the President for nomination. Matthews Dec. ¶¶4, 11.

6. Defendant denies paragraph 6 to the extent it is not supported by the cited reference to the ABA Brochure, which states only that: "Only in rare instances--less than 1 percent of the nominations--has a President decided to nominate a person found 'Not Qualified' by the Committee," (ABA, Standing Committee on Federal Judiciary: What It Is and How It Works 7 (1983) ("ABA Brochure") (attached as Exh. A to Plaintiff's Conditional Response to Defendant's Statement of Material Facts filed April 30, 1987)), and defendant admits only that most candidates for nomination which have received a "not qualified" rating by the ABA Committee have not been recommended by the Attorney General for nomination by the President. Defendant refers the Court to paragraph 11 of the Matthews Declaration regarding the factors considered by the Attorney General in making his recommendations to the President.

7. Defendant denies plaintiff's characterizations in paragraph 7 to the extent they are inconsistent with the cited Matthews Declaration which indicates that the ABA Committee's ratings of proposed nominees are considered by the Attorney General in making his determinations whether to recommend potential nominees to the President, but that the decision as to whether to nominate a candidate is made by the President. Matthews Dec. ¶¶3, 11.

8. Defendant denies plaintiff's unsupported statement in paragraph 8 except to admit that after an individual is nominated to a federal judgeship, the ABA Committee's rating of that individual would become a matter of public record through the Senate confirmation process.

9. Defendant is without sufficient information to admit or deny plaintiff's statement regarding disclosure of "other information" or disclosure to "other individuals." Defendant denies the remaining portions of paragraph 9 to the extent plaintiff's characterizations are inconsistent with and unsupported by the cited ABA Brochure. Defendant admits that the reasons for the ABA Committee's rating of a potential nominee are sometimes revealed to the Department of Justice, and that after an individual is nominated, those reasons are sometimes revealed to the Senate Judiciary Committee, but further states that the identities of the ABA Committee sources and the ABA Committee's internal reports remain confidential. ABA Brochure 6-10; WLF v. ABA, No. 85-3918, slip. op. at 203 (D.D.C. Nov. 26, 1986); WLF Complaint, Exh. D.

10. Defendant is without sufficient information to admit or deny the extent to which names of potential nominees have been given by the ABA to various individuals, groups, and organizations, bu[illegible]endant does not dispute plaintiff's statement to the extent i[illegible]onsistent with Exhibit D to plaintiff's Complaint (November 27, 1985 Letter from Robert B. Fiske, Jr.).

Respectfully submitted,
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Assistant Attorney General
JOSEPH diGENOVA
United States Attorney
/s/
ROBERT J. CYNKAR
Deputy Assistant Attorney General
/s/
DAVID J. ANDERSON
/s/
LINDA LANCE
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION,)
Plaintiff,)
and)
PUBLIC CITIZEN,)
Plaintiff-Intervenor,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE,)
Defendant.)
)

ANSWER OF DEFENDANT-INTERVENOR AMERICAN BAR ASSOCIATION TO COMPLAINT OF WASHINGTON LEGAL FOUNDATION

Defendant-Intervenor, the American Bar Association ("ABA"), on behalf of itself and its Standing Committee on Federal Judiciary (the "Committee" or "ABA Committee"), hereby answers the complaint filed by Plaintiff Washington Legal Foundation ("WLF") as follows:

DEFENSES

FIRST DEFENSE

The Federal Advisory Committee Act ("FACA") does not apply to the ABA Committee because the ABA Committee does not constitute an "advisory committee" as defined in the FACA and regulations promulgated thereunder.

SECOND DEFENSE

The FACA, if applied to the ABA Committee, would violate the ABA Committee's First Amendment rights of freedom of speech and association by unconstitutionally intruding into the affairs of a private organization, while chilling the free

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PUBLISHER'S NOTE

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effective input from minority groups and women's groups interested in the judicial selection process. This practice was discontinued in November of 1985, with a determination by the ABA Committee to obtain this information in other ways. The reasons for the Committee's decision are described in the letter (attached to WLF's complaint as Exhibit D) dated November 27, 1985, from Committee Chairman Robert B. Fiske, Jr., to Paul D. Kamenar, Executive Legal Director of WLF.

From time to time, the ABA Committee has received complaints that in its personnel makeup, and in its evaluations, it is too conservative. It has also received complaints that in its personnel makeup, and in its evaluations, it is too liberal. The ABA Committee's fact-gathering and evaluation functions exist independent of its members' own personal political and philosophical views.

To the extent the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

10. The ABA denies the allegations contained in this paragraph.

11. The ABA admits that the Chairman of the Committee routinely discusses via telephone calls with the Department of Justice representatives matters such as the timing of pending investigations of judicial candidates as well as the ABA Committee ratings which appear likely to result in such investigations. From time to time, in those instances where it appears that there is a significant possibility that the Committee may make a "Not Qualified" rating, the Chairman and one or more members of the Committee meet with representatives of the Department of Justice prior to the circulation of a formal report to all members of the Committee. To the extent that the allegations contained in this paragraph are inconsistent with the foregoing answer, such allegations are denied.

12. The ABA states that the decision whether to initiate or remove the candidate's name for consideration as a prospective nominee to the federal judiciary is one wholly made by the President of the United States. The ABA admits that from time to time, in those instances in which it appears that a rating of "Not Qualified" is a significant possibility, the Department of

Justice has told the Committee that a prospective nominee's name was being withdrawn from consideration for a particular vacancy. In that circumstance, the Committee does not conduct any further investigation or evaluation. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

13. The ABA states that the decision whether to nominate a candidate for the federal judiciary is made solely by the President of the United States, with the advice and consent of the Senate. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

14. The ABA admits that it is involved in the process of investigating and evaluating the qualifications of candidates for the federal judiciary. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

15. The ABA admits that WLF sent a letter dated September 30, 1985, to the Chairman of the ABA Committee and that in such letter WLF demanded that the Committee provide WLF with the names of persons under consideration for federal judicial appointments. The ABA denies the remaining allegations contained in this paragraph.

16. The ABA is without knowledge or information sufficient to form a belief as to when WLF received Mr. Fiske's reply to WLF's letter dated September 30, 1985. The ABA admits that WLF sent a letter dated October 18, to Mr. Fiske and to the President of the ABA, William W. Falsgraf. The ABA also admits that in such letters WLF's demands become more intrusive, requesting that the ABA Committee "provide us with the reports and minutes of all meetings of your Committee held during the last two years where judicial nominees were discussed and considered, as well as inform us of the date and place of all future meetings." The ABA denies the remaining allegations contained in this paragraph.

17. The ABA admits that WLF transmitted a letter dated November 21, 1985, to Mr. Fiske. The ABA further states that

such letter speaks for itself. The ABA denies the remaining allegations contained in this paragraph.

18. The ABA admits that Mr. Fiske wrote a letter to WLF on November 27, 1985, which speaks for itself.

19. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

20. The ABA denies the allegations contained in this paragraph.

21. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-20 of WLF's complaint.

22. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

23. The ABA denies the allegations contained in this paragraph.

24. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-23 of WLF's complaint.

25. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

26. The ABA denies the allegations contained in this paragraph.

27. The ABA denies the allegations contained in this paragraph, except that the ABA admits that WLF seeks to attend and observe meetings of the ABA Committee and to obtain any transcripts of such meetings.

28. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-27 of WLF's complaint.

29. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

30. The ABA admits that no advisory committee charter has been filed with any party on behalf of the ABA Committee. The ABA states in further response that such filing is

neither necessary nor required by law. The ABA denies any remaining allegations contained in this paragraph.

31. The ABA denies that the ABA Committee has been or will be in violation of the FACA and deny that such Act even applies to the affairs of the ABA Committee.

32. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-31 of WLF's complaint.

33. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

34. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

35. The ABA denies the allegations contained in this paragraph.

36. The ABA denies that the ABA Committee has been or will be in violation of the FACA and that such Act even applies to the affairs of the ABA Committee. The ABA denies that WLF is entitled to any relief.

Respectfully submitted,
/s/
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DATED: August 25, 1988

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL)
FOUNDATION,)
Plaintiff,)
and)
PUBLIC CITIZEN,)
Plaintiff-Intervenor,)
) Civil Action No. 86-2883
v.) (Judge Joyce Hens Green)
UNITED STATES)
DEPARTMENT OF)
JUSTICE,)
Defendant.)
)

ANSWER OF DEFENDANT-INTERVENOR AMERICAN BAR ASSOCIATION TO COMPLAINT OF PLAINTIFF-INTERVENOR PUBLIC CITIZEN

Defendant-Intervenor, the American Bar Association ("ABA"), on behalf of itself and its Standing Committee on Federal Judiciary (the "Committee" or "ABA Committee"), hereby answers the complaint filed by Plaintiff Washington Legal Foundation ("WLF") as follows:

DEFENSES

FIRST DEFENSE

The Federal Advisory Committee Act ("FACA") does not apply to the ABA Committee because the ABA Committee does not constitute an "advisory committee" as defined in the FACA and regulations promulgated thereunder.

SECOND DEFENSE

The FACA, if applied to the ABA Committee, would violate the ABA Committee's First Amendment rights of freedom of speech and association by unconstitutionally intruding into the affairs of a private organization, while chilling the free speech and associational interests of the ABA Committee and third parties.

THIRD DEFENSE

The FACA, if applied to the ABA Committee, would impermissibly impinge on the ability of the President to discharge effectively the constitutionally-assigned executive power of judicial appointment, pursuant to Article II, Section 2, Clause 2 of the United States Constitution, thereby violating the principle of separation of powers.

FOURTH DEFENSE

Public Citizen's complaint fails to state a claim upon which relief can be granted.

Defendant-Intervenor ABA further answers Public Citizen's complaint as follows:

1. The ABA admits that Public Citizen is attempting to obtain declaratory and injunctive relief from this Court, and that Public Citizen purports to base its claim under the FACA, but otherwise denies the allegations contained in this paragraph.

2. The ABA admits the allegations contained in this paragraph.

3. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

4. The ABA admits that the Department of Justice is a government agency subject to the requirements of the FACA. The ABA denies that the ABA Committee has been and is "utilized" by the Department of Justice for the purpose of obtaining "advice and recommendation," as opposed to fact-gathering and evaluations, concerning the professional qualifications of prospective federal judicial nominees.

5. The ABA admits that the ABA Committee investigates and evaluates prospective federal judicial nominees and advises the Department of Justice of these evaluations. The ABA denies the remaining allegations contained in this paragraph.

6. The ABA admits that the Department of Justice forwards to the ABA Committee the names of possible nominees for federal judicial posts, that the ABA Committee investigates, evaluates and rates such candidates, and that the ABA Committee informs the Department of Justice of such ratings. To the extent that the allegations contained in this paragraph are inconsistent with the foregoing answer, such allegations are denied.

7. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

8. The ABA denies the allegations contained in this paragraph.

9. The ABA denies the allegations contained in this paragraph.

10. The ABA denies the allegations contained in this paragraph. The ABA denies that Public Citizen is entitled to any relief.

Respectfully submitted ,

/s/

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DATED: August 25, 1988

[Certificate of Service omitted in printing]

APPELLANT'S BRIEF

⑤ ④

Supreme Court, U.S.
FILED
JAN 27 1989
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CLERK

Nos. 88-429, 88-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT PUBLIC CITIZEN

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56 pp

QUESTION PRESENTED*

Did the district court err in ruling that none of the provisions of the Federal Advisory Committee Act can be applied to the Department of Justice's use of the American Bar Association's Standing Committee on the Federal Judiciary without violating both the doctrine of separation of powers and the Appointments Clause of the Constitution?

---

*Public Citizen, the appellant in No. 88-429 and an appellee in No. 88-494, was the plaintiff-intervenor in the court below. The Washington Legal Foundation, an appellee in No. 88-429 and the appellant in No. 88-494, was the plaintiff in the district court. Appellee Department of Justice was the defendant below, and appellee American Bar Association intervened as a party defendant in the district court after judgment was entered, for the purpose of participating in these appeals. No other parties, except those named in the caption, appeared in the district court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-429, 88-494

PUBLIC CITIZEN,
Appellant,
v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al*.,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al*.,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT PUBLIC CITIZEN

OPINION AND ORDER BELOW

The opinion and order of the district court are reproduced in an appendix to appellant's jurisdictional statement (App. 1a-30a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on August 4, 1988, holding the application of an Act of Congress unconstitutional. App. 28a. A notice of appeal to this Court was filed on September 1, 1988. App. 29a. The Court noted probable jurisdiction on December 5, 1988, and, on the same day, consolidated this case with *Washington Legal Foundation v. United States Department of Justice, American Bar Association and Public Citizen*, No. 88-494. The jurisdiction of this Court was invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

The Federal Advisory Committee Act, 5 U.S.C. App. II, is set out in an appendix to appellant's jurisdictional statement (App. 31a-45a).

STATEMENT OF THE CASE

This appeal seeks reversal of a district court ruling that a statute enacted by Congress to regulate the executive branch's use of advisory committees is unconstitutional as applied to an advisory relationship of vital importance to the public — the Justice Department's use of the American Bar Association's Committee on the Federal Judiciary to advise it concerning potential federal judicial nominees. Before turning to the facts of this case, we first provide a brief overview of why the Federal Advisory Committee Act was enacted, what its various provisions require, and how it has been implemented by federal agencies for the past 16 years.

1. The Federal Advisory Committee Act

After holding extensive hearings in 1970 and 1971 on the 3,200 federal advisory committees then "circulating about without any substantial control over them," Congress concluded that it was essential to establish a comprehensive system for regulating this influential "fifth arm of the government." 118 Cong. Rec. 16,296 (1972) (Remarks of Rep. Monagan), *cited in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 293 (Comm. Print 1978) ("Source Book"). Accordingly, when the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), was enacted in 1972, Congress recognized that, while advisory committees are "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . . [,] standards and uniform procedures should govern the[ir] establishment, operation, administration and duration . . . ." 5 U.S.C. App. II § § 2(a), (b)(4). FACA was signed into law by President Nixon, who not only expressly endorsed the statute's "standards for the establishment, operation, termination, and control of advisory committees," but who also directed that the "heads of all executive departments and agencies shall take appropriate action to assure their ability to comply with the provisions of the Act." Executive Order 11,686 (1972), *reprinted in* Source Book at 340.

FACA does not regulate the subject matter that advisory committees may consider, nor does it in any way dictate the results of their deliberations. Instead, the Act establishes uniform rules governing the procedures and operations of such committees. Many of these rules parallel provisions found in other open government statutes, such as the Freedom of Information Act, 5 U.S.C. § 552, the Government-in-the-Sunshine Act, 5 U.S.C. § 552b, the Privacy Act, 5 U.S.C. § 552a, the Presidential Records Act of 1978, 44 U.S.C. § 2201, and the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note. And, as is true with these other statutory schemes, the implementation of FACA is assigned to executive branch officials.

The first responsibility created by FACA is that the head of each federal agency using an advisory committee must supervise the committee's activities and assure that the committee assembles and maintains its reports, records, and other papers. 5 U.S.C. App. II § 8(b). Second, the agency head must file a charter for the committee which, among other things, describes the committee's functions and objectives and identifies the agency official to whom the committee reports. *Id.* § 9(c). Third, the statute provides that agencies must generally provide the public with "timely notice" of committee meetings, that a designated federal official must attend each such meeting, and that a "complete and accurate" record of "matters discussed and conclusions reached" must be maintained by the agency. *Id.* §§ 10(a)(2), (c), (e), (f). However, a committee meeting may be closed to the public in whole or in part if the agency determines that matters to be discussed at the meeting fall within one of the ten exemptions to the Government-in-the-Sunshine Act. *Id.* § 10(d); *see also* 5 U.S.C. § 552b(c).

Fourth, FACA requires that the agency maintain a public reading room containing copies of the records of its advisory committees, but the Act authorizes the agency to withhold any records that fall within one of the nine exemptions to the Freedom of Information Act. *Id.* § 10(b); *see also* 5 U.S.C. § 552(b). Finally, although FACA provides that the membership of advisory committees must be "fairly balanced in terms of the points of view represented and the functions to be performed," *id.* §§ 5(b)(2), (c), agencies have wide latitude in meeting this requirement by defining the functions of their committees, as well as the type of representation that is relevant to the performance of those functions. *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

Since 1972, thousands of advisory committees have been chartered in accordance with FACA and have complied with the Act's various requirements. During fiscal year 1987 alone, according to the President's most recent report on the implementation of FACA, 57 Federal departments and agencies sponsored 992 advisory committees under the Act; a total of 19,837 individuals served as members of such committees; 3,430 committee meetings were held (1,830 of which were either totally or partially closed under one or more of the Act's exemptions); and 695 reports were issued. *See Sixteenth Annual Report of the President on Federal Advisory Committees* at 1, 3, 9 (1988). Reflecting the "diverse interests of the sponsoring agencies, committee activities covered topics from national security to specific fiscal, social and technical issues." *Id.* at 1. Of particular relevance here, 177 advisory bodies — 17.8% of the committees chartered under the Act — were created to review the qualifications and credentials of individuals being considered for various types of governmental grants and benefits. *Id.* at 2. Thus, numerous advisory bodies that are directly analogous to the ABA Committee have successfully performed their advisory functions while complying with FACA's requirements.

2. The ABA Committee

For a number of years, a committee of the American Bar Association, officially known as the American Bar Association's Standing Committee on the Federal Judiciary (the "ABA Committee"), has advised the Justice Department on potential nominees to the federal bench. Under the present system, the

Department initiates the advisory process by requesting the ABA Committee to investigate and evaluate the qualifications of potential nominees and to provide a formal recommendation concerning them to an Assistant Attorney General. App. 5a. Although the Department gathers information about prospective nominees from many sources, only the ABA Committee is regularly consulted before a recommendation is made by the Department to the President or before a nomination is sent by the President to the Senate. *Id.* Moreover, only the ABA Committee is given detailed information about judicial candidates to assist it in providing pre-nomination advice to the Department. *Id.*

The ABA's review process has "traditionally involved confidential interviews with lawyers, judges, and professors in the nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications." ***Washington Legal Foundation v. American Bar Ass'n***, 648 F. Supp. 1353, 1355 (D.D.C. 1986). After an investigation is completed, a report is prepared and circulated to the full ABA Committee, which then decides on a final recommendation — either "exceptionally well qualified," "well qualified," "qualified," or "not qualified." App. 6a. This recommendation is provided to the Justice Department, along with an indication of whether it is supported unanimously or simply by a majority of the Committee. *Id.* The rationale for a particular rating is sometimes provided to the Department as well. *Id.*

After the ABA Committee provides its recommendation, the Department, in conjunction with the President's judicial selection committee — which is not covered by FACA because it is composed entirely of full-time federal officials, *see* 5 U.S.C. App. II § 3(2)(C) — gathers information from other sources, including the Federal Bureau of Investigation and other government agencies. App. 5a. The Justice Department then forwards its recommendations to the President concerning the qualifications of persons who are being considered for federal judgeships. App. 7a.

After the President makes his selection, and the nomination is sent to the Senate, the Committee's rating is routinely made available to the Senate and the public. *Id.* The Senate, in determining whether to consent to a prospective appointee, also relies heavily on the Committee's rating, and occasionally solicits additional advice from the Committee as to how or why it arrived at a particular rating. App. 19a n.46, 25a.[1]

3. Proceedings Below

In 1986, the Washington Legal Foundation ("WLF") filed suit against the ABA Committee, seeking a declaration that it is a federal advisory committee and must therefore comply with FACA. *See WLF v. ABA Committee, supra*, 648 F. Supp. at 1355. That suit was dismissed on the ground that the proper defendant in this kind of FACA case is the government agency utilizing the committee — here, the Justice Department — and not a "private, pre-existing group that has not been established, appointed, and financed by the government." *Id.* at 1361.

Shortly before the dismissal of the suit against the ABA Committee, WLF filed this action against the Justice Department, asserting that, although the Department routinely solicits the ABA Committee's advice and recommendations regarding prospective judicial nominees, it is not complying with any of FACA's requirements. Jurisdiction in the district court was based on 28 U.S.C. § 1331. In response, the Justice Department moved to dismiss the complaint on two independent grounds: (1) that the ABA Committee is not subject to FACA because it is not being utilized as a federal advisory committee; and (2) that FACA cannot be constitutionally applied to the ABA Committee.

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[1] With respect to nominees to this Court, the Committee prepares and provides ratings to the Senate, even though the President no longer obtains advice from the Committee before making his selection. Since FACA applies only to the executive branch's use of advisory committees, and not to the Senate's, 5 U.S.C. App. II § § 3(2), 3(3), the Committee's activities regarding nominees to this Court are not subject to FACA.

Upon learning that the Justice Department had challenged the constitutionality of FACA, appellant Public Citizen, a non-profit, public-interest organization, moved to intervene as a party plaintiff because "resolution of this case — especially the constitutional issue raised by the government — may have an enormous impact on Public Citizen's rights and interests under FACA in the future." Memorandum of Points and Authorities in Support of Motion to Intervene at 3.

Along with its motion to intervene, which was granted without opposition, Public Citizen filed a complaint for declaratory and injunctive relief and a motion for summary judgment, which differed from the papers that had been filed by WLF in a number of significant respects. Thus, in language similar to that employed by WLF, Public Citizen's complaint contended that the ABA Committee "is a federal advisory committee as that term is defined in section 3(2) of FACA, because defendant Department of Justice is, and has been, utilizing it in the interest of obtaining advice and/or recommendations." Complaint, ¶ 3 (J.A. 26). However, because FACA assigns the responsibility for implementing its various provisions to the Department, and also affords the Department considerable flexibility in determining how those provisions should be implemented, Public Citizen, in contrast to WLF, recognized that it would be inappropriate for a court to rule on whether or how any of the statute's specific requirements should be met before the Department itself had an opportunity to make these determinations. Hence, Public Citizen's complaint simply asked the district court to enter an order "declaring that the Justice Department's utilization of the ABA Committee is covered by FACA, and ordering the Department to comply with FACA's requirements when it utilizes the ABA Committee in the future." Complaint, p. 4 (J.A. 26).

Moreover, while WLF argued below that there were factual disputes regarding the ABA Committee that needed to be explored through discovery, Public Citizen disagreed and instead filed a motion for summary judgment. With respect to the Justice Department's constitutional defense, Public Citizen's summary judgment memorandum pointed out that the Justice Department had never explained how, or even which of, FACA's various requirements would hamper the Department's use of the Committee, but instead had launched an "undifferentiated, generalized attack on the application of any and all of FACA's provisions . . . ." *Id.* at 2. Relying heavily on this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Public Citizen urged the district court to decide only those constitutional questions that must be resolved at this juncture, *i.e.*, the constitutionality of FACA's threshold requirements of filing a charter, designating a federal oversight officer, and announcing committee meetings in advance. The Department has never argued that these requirements would impair its use of the Committee.

Nevertheless, the district court (Judge Joyce Hens Green) entered judgment in favor of the Department. The court agreed with plaintiffs that "the ABA Committee is an advisory committee 'utilized' by DOJ within the meaning of FACA, 5 U.S.C. App. II, § 3(2)," but held that "FACA cannot constitutionally be applied to the ABA Committee because to do so would violate the express separation of nomination and consent powers set forth in Article II of the Constitution and because no overriding congressional interest in applying FACA to the ABA Committee has been demonstrated." App. 4a.

At the outset of its opinion, the court rejected the Department's statutory argument, finding that the Department's use of the Committee is covered by the "plain language" of the statute, App. 7a., which defines an "advisory committee" as "***any*** committee" that is "established or ***utilized*** by one or more agencies . . . in the interest of obtaining advice or recommendations . . . ." 5 U.S.C. App. II § 3(2) (emphasis added). The court further found that the Department's use of the Committee constitutes precisely the sort of advisory relationship that Congress intended to subject to FACA's procedural requirements:

> [T]he ABA Committee is a formal committee, with a clearly defined structure, singular purpose, and apparently only two "clients" — the Attorney General and the Senate Judiciary Committee. The ABA Committee is not merely a group of casually associated individuals who are consulted singly; it self-consciously and purposefully acts "as a committee." The ABA Committee is thus a traditionally, routinely, and preferentially utilized source of advice for DOJ and the President on potential nominees for federal judgeships.

App. 10a-11a (footnotes omitted). Since the "plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all support the conclusion that the ABA Committee falls within FACA's definition of advisory committee," the district court reasoned that the constitutional issue raised by the Justice Department "cannot fairly be avoided" without "press[ing] statutory construction 'to the point of disingenuous evasion.'" App. 14a, *quoting United States v. Locke*, 471 U.S. 84, 96 (1985).

The district court then ruled that none of FACA's requirements may constitutionally be applied to the Department's use of the ABA Committee. Initially, the court considered the Appointments Clause in Article II, under which the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . ." U.S. Const. art. II, § 2, cl. 2. According to the district court, "the conclusion that the legislative branch cannot intervene in the Executive's selection process for judicial nominees springs directly from the text of the Constitution," App. 19a, but the court never explained which part of the Appointments Clause mandates that conclusion or how any of the provisions of FACA would constitute "interven[tion] in the Executive's selection process."

The district court chose not to base its decision entirely on

the Appointments Clause. Rather, it determined that, "because the Supreme Court has suggested that a more flexible, pragmatic approach be applied in analyzing separation of powers issues," it should also engage in a "balancing analysis" — *i.e.*, assessing the degree to which the application of FACA would impair the President's nominating power and then balancing that impairment against the congressional interests served by the Act. App. 19a.

With regard to the impairment side of the equation, the court asserted, without any explanation, that the application of the Act to the ABA Committee creates a "significant potential for disruption of the President's constitutional prerogative . . . ." App. 20a. Although the court stated that "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality," App. 21a, it did not explain why the Advisory Committee Act, which was carefully crafted to safeguard legitimate interests in confidentiality, would not adequately protect the work of the ABA Committee. While the court acknowledged that even advisory committees dealing with "sensitive foreign policy or national security issues" have successfully complied with FACA's requirements, App. 24a, it nonetheless concluded that the ABA Committee cannot be required to comply with the law because its mission involves "investigation of an individual's competence, integrity, and temperament." App. 24a.

Having found a "potential for significant disruption" if FACA were applied to the Justice Department's use of the ABA Committee, the court proceeded to consider whether there is an "'overriding' congressional interest in application of FACA to the ABA Committee." App. 25a. The court determined that there is no such interest for two interrelated reasons. First, Judge Green asserted that the "only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function," and thus no other legitimate legislative objective — such as the public's interest in ensuring that the Justice Department obtains advice from the ABA Committee in accordance with FACA's minimum legal standards of accountability, openness, and record keeping — could be advanced through the application of FACA in this case. App. 25a. Second, the court concluded that, even if public accountability is a legitimate congressional purpose, this objective is fully "satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information." *Id.* On the basis of these conclusions, the district court ruled that no part of FACA can be constitutionally applied to the Justice Department's use of the ABA Committee. App. 26a-27a.

SUMMARY OF ARGUMENT

As the district court held, there can be no genuine dispute that the Justice Department's use of the ABA Committee falls squarely within the coverage of FACA. Both the statutory language and legislative history, as well as the constructions of the law by the courts and the General Services Administration ("GSA"), compel the conclusion that Congress intended to apply FACA's standards of public accountability to the executive branch's use of entities such as the ABA Committee, which are "traditionally, routinely, and preferentially utilized source[s] of advice. . . ." App. 11a.

While the district court correctly found that it could not construe FACA so as to avoid the Justice Department's constitutional challenge, it failed to follow this Court's instructions regarding the proper resolution of such a challenge. First, contrary to this Court's dictates, the district court accepted the Justice Department broad-scale attack on a comprehensive, multifaceted statutory scheme, when many of FACA's provisions would not even arguably infringe on the President's ability to nominate federal judges. Thus, the district court should not have ruled on the "constitutionality of all the separate phases of a comprehensive statute," *Watson v. Buck*, 313 U.S. 385, 402 (1941),

but should have instead focused on those features of the law that would *necessarily* be triggered by a threshold ruling that the Justice Department's use of the ABA Committee is covered by FACA.

Under such a ruling, only three events would definitely occur: (1) the Department would be required to prepare and file a charter for the ABA Committee, 5 U.S.C. App. II § 9(c); (2) the Department would be required to designate an Advisory Committee Management Officer who would be responsible for maintaining the records of the Committee and supervising overall compliance with the law, *id.* § 8; and (3) the Department would be required to provide the public with advance notice of committee meetings, *id.* § 10(a)(2). It is inconceivable, and the Justice Department has never argued, that these requirements alone would in any way adversely affect the Department's ability to use the Committee, let alone impair the President's actual nominating function. Instead, the government has focused its dissatisfaction on statutory provisions that provide for public access to *some* advisory committee documents and *some* committee meetings, yet the applicability of these provisions to any particular meeting or document of the ABA Committee is entirely conjectural at this time.

Second, the district court not only entertained "speculative questions based upon purely hypothetical fact situations," *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 335 (D.D.C. 1976) (three-judge district court), *aff'd*, 433 U.S. 425 (1977), but it compounded its error by assuming worst-case scenarios regarding the application of the statute's meeting and document production provisions. Thus, while the Department has considerable latitude in implementing these provisions to avoid any adverse effect on its use of the Committee's recommendations, the district court simply assumed that FACA would necessarily breach the confidentiality of the Committee's evaluations of potential nominees to the federal bench. In so doing, the court failed to recognize that its task is "not to destroy the

Act if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973).

Third, the district court's verdict of unconstitutionality is fundamentally inconsistent with this Court's ruling in *Morrison v. Olson*, ____ U.S. ____, 108 S. Ct. 2597 (1988), which upheld the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. According to the district court, Congress has little, if any, constitutional authority to enact any law that has even a peripheral bearing on the power to nominate federal judges because the Constitution assigns the nomination function to the President. In *Morrison*, however, the Court emphatically rejected the Justice Department's virtually identical argument that Congress is prohibited from enacting any laws bearing on the prosecutorial power simply because the President is assigned the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

If anything, the Independent Counsel provisions at issue in *Morrison*, which actually *displace* the President's power to control a particular class of cases, infringe far more on the President's authority than does FACA, which leaves the President's power to make judicial appointments entirely intact and, at most, could only indirectly affect the nominating process. Indeed, in light of *Morrison*, *Nixon v. Administrator*, and other separation of powers decisions upholding broad legislative schemes, including the Court's recent decision in *Mistretta v. United States*, ____ U.S. ____, No. 87-7028 (U.S. Jan. 18, 1989), there is no basis for concluding that a procedural statute, such as FACA, cannot constitutionally be applied to an advisory committee that does not even report directly to the President.

Finally, the Court should give short shrift to the First Amendment argument raised for the first time in the ABA's response to appellants' jurisdictional statements (at 13-16). There is no reason to deviate from the well-established principle that new arguments should not be considered for the first time in this Court. In any event, the argument has no validity because FACA does not impede the ability of the ABA or anyone else to exercise First Amendment rights. Rather, FACA is simply directed at the Department's decision to use the ABA Committee as a routine, preferred source of advice and recommendations on judicial nominations. The ABA does not have a First Amendment right to have special access to otherwise confidential governmental information or to have a role in government decisionmaking that is not afforded to other members of the public. If the ABA wishes to play a special role in the nomination process, it must abide by FACA's provisions, and nothing in the First Amendment allows it to avoid that responsibility.

ARGUMENT

Before turning to the district court's constitutional ruling, appellant will first address the Department's statutory argument, which the district court rejected. As appellant will demonstrate, no "construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

I. THE JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE IS COVERED BY FACA.

A. Statutory Language

While FACA's procedural requirements are modest, its coverage is not. Congress envisioned the Act as a "comprehensive scheme to control the creation and operation of advisory committees in the executive branch of the federal government." *Center for Auto Safety v. Cox*, 580 F.2d 689, 692 (D.C. Cir. 1978). Thus, section 3(2) of the statute broadly defines an advisory committee as

> *any committee*, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is
>
> . . .
>
> (B) established or *utilized* by the President,
>
> or
>
> (C) established or *utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government* . . ..

5 U.S.C. App. II § 3(2) (emphasis added). Since the ABA Committee was not "established" by the Justice Department, the core statutory question is whether the Committee is being "utilized" by the Department "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . .." *Id.* at § 3(2)(C). Obviously, if the Court relies on the "ordinary meaning" of FACA's language, as is generally appropriate in issues of statutory construction, *Kosak v. United States*, 465 U.S. 848, 853 (1984), the question is not difficult to resolve. As the district court pointed out, the "common-sense meaning of 'utilized' is to 'make use of.'" App. 8a, *quoting Webster's Third New International Dictionary* (1963). The Department has never seriously disputed that it routinely "makes use of" the ABA's Committee's recommendations regarding the qualifications of potential candidates for the federal bench. To the contrary, the Department admitted below that "[o]ne source of advice and information used by the Attorney General in advising the President is the ABA . . . Committee." Defendant's Memorandum of Points and Authorities in Support of Its Motion to Dismiss at 9; *see also* Plaintiff-Intervenor's Statement of Material Facts at ¶ 5, which was admitted by the Department ("the Justice Department and the President *utilize* the recommendations and evaluations of the ABA Committee in determining whether to nominate individuals for federal judgeships") (emphasis added) (J.A. 31).

Indeed, as the district court emphasized, "the ABA Committee is the *only* non-governmental entity routinely provided the names of potential nominees by DOJ in advance of public announcement," and which "in return . . . provides its recommendation and report" to the Department and eventually the Senate. App. 10a (emphasis added). Thus, this is not a situation where an agency actively solicits advice from many outside institutions and gives equal weight to each. Rather, the Department "has directly solicited from the ABA Committee its evaluation of and recommendation on federal judicial nominees" for over 30 years, and concededly places heavy reliance on the Committee's advice. App. 10a. Accordingly, the "clear and unequivocal" language of section 3(2) of FACA encompasses the Department's use of the ABA Committee. *United States v. Oregon*, 366 U.S. 643, 648 (1961); *see also TVA v. Hill*, 437 U.S. 153, 173 (1978).

B. Interpretation By GSA And The Courts

The district court's conclusion is reinforced by the interpretation given to the Act by both the courts and the General Services Administration, the agency responsible for administering the Act. *See* Executive Order 12,024, 42 Fed. Reg. 61,445 (1977). GSA's regulations have consistently defined a "utilized" advisory committee as

> a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations . . ..

52 Fed. Reg. 45,930 (1987); *see also* 41 C.F.R. § 101-6.1003 (1983). This definition, which was not criticized by the Justice

Department or any other commenter when proposed in 1987, *see* 52 Fed. Reg. 18,776 (1987), could hardly describe the ABA Committee more perfectly. Thus, the Committee (1) has had an "established existence" outside the Federal Government for over thirty years; (2) is composed "in whole . . . of other than fulltime officers or employees of the Federal Government;" (3) has been adopted by the Department as a "preferred source from which to obtain advice or recommendations" on a "specific issue or policy," namely, the qualifications of potential judicial nominees; and (4) is "not merely a group of casually associated individuals who are consulted singly" but, rather, "self-consciously and purposefully acts 'as a committee.'" App. 11a, *quoting Hearings Before the Committee on the Judiciary of the United States Senate: Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 938 (1987) (testimony of ABA Committee Chairman Harold Tyler). In other words, the Committee is being used by the Department in precisely the "same manner as [the Department] would obtain advice or recommendations from an established advisory committee," except that the Department is not complying with any of FACA's requirements. 52 Fed. Reg. 45,930 (1987).[2]

Judicial constructions of FACA coincide with GSA's approach. For example, *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), involved meetings between the Federal

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[2] As the district court pointed out, GSA's regulations also "set forth several specific examples of types of advisory committees exempt from the Act . . . none of which apply to the ABA Committee. Indeed, several mention by implication certain characteristics of the ABA Committee that bring it within the Act's purview." App. 13a. *See, e.g.* § 101-6.1004(i) (exempting groups convened by federal officials for the purpose of "obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations"; indicating that where a group is used "to obtain consensus advice" it is covered by the Act).

Highway Administration ("FHWA") and the American Association of State Highway and Transportation Officials ("AASHTO"), an organization consisting of state transportation officials. The district court found that AASHTO was "utilized" as an advisory committee because "the government went directly to AASHTO, among other groups, for specific advice on pending draft regulations. In doing so, the government employed AASHTO much as advisory committees are frequently and traditionally employed." 414 F. Supp. at 224. This ruling was affirmed by the D.C. Circuit:

> [W]e find nothing in the regulatory scheme of the Act to suggest that Congress intended to exclude organizations fitting the definition of advisory committee from coverage simply because they have an existence independent of the agency utilizing them . . . . [W]hen the Administrator [of the FHWA] in the course of developing regulations to govern the Federal-aid highway program discloses his proposed regulations to select groups and obtains their advice and recommendations, he utilizes those groups as advisory committees.

Center for Auto Safety v. Cox, supra, 580 F.2d at 694.

A similar result was reached in *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979), where the Food and Drug Administration ("FDA") was considering whether to take regulatory action with regard to the use of liquid protein products in dieting. In order to "assist the FDA in selecting the best course of action," agency officials decided to "obtain the advice of experts in the field of obesity research" and thus met with a group of such experts. *Id.* at 329-30. In determining that the meeting was covered by FACA, Judge Friendly "considered the directness of the relationship between the alleged advisory committee and government action," and emphasized that the FDA had "leaned . . . strongly on the advisory group" in framing the regulation at issue. *Id.* at 336 & n.10.

One other decision construing FACA is also instructive because, although it found that FACA did not apply, its reasoning directly supports the application of the law to the Justice Department's use of the ABA Committee. In *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975), Judge Gesell held that FACA did not cover a series of meetings between executive branch officials and varying private sector groups. In so holding, he reasoned that FACA "was not intended to apply to all amorphous, ad hoc group meetings," or to "impede casual, informal contacts by the President or his immediate staff with interested segments of the population . . . ." *Id*. at 1233-34. Rather, Congress intended to cover "groups having some sort of established structure and defined purpose as 'advisory committees,'" and which receive a governmental "request for specific recommendations on a particular matter of governmental policy." *Id*. In contrast, the Department here concedes that the ABA Committee has an established structure and defined purpose as an advisory committee, and that its very reason for being is to respond to the Department's request for advice regarding potential judicial nominees.

C. Legislative History

FACA's legislative history confirms the courts' common-sense reading of FACA's language, and demonstrates that entities like the ABA Committee were clearly within Congress' contemplation when it drafted FACA. Thus, while the House bill, as originally reported, did not expressly cover advisory bodies that are "utilized" by executive branch agencies, the committee report stated that the definition of advisory committee was "meant to include those committees which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory Committee formed by the President himself or the agency itself." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3494.

The House Report further emphasized that "[i]t would be contrary to the purpose and intent of this bill" if independent entities used as advisory bodies "were to be exempted from the provisions of this bill." *Id*; *see also Lombardo v. Handler*, 397 F. Supp. 792, 798 (D.D.C. 1975). In addition, as an example of a committee subject to the Act, the House cited the Advisory Council on Federal Reports ("ACFR"), which was organized by national business organizations and utilized by the Office of Management and Budget ("OMB") to obtain advice on executive branch reporting and information-gathering activities. *See* House Report at 6.

On the Senate side, it was even clearer that entities like the ABA Committee were to be covered by the law. The Senate bill defined an advisory committee as encompassing "any committee . . . established or organized for the purpose of furnishing advice, recommendations, or information to any office or agency." The Senate Report explained, in unequivocal terms, that

> the intention is to interpret the words "established" and "organized" in their *most liberal sense*, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, *and whether or not Federal money is expended*, to obtain advice and information, such group is covered by the provisions of this bill.

S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972), *reprinted in* Source Book at 158 (emphasis added). Thus, it is evident that both the House and Senate committees wanted FACA to cover advisory bodies that are structured like the ABA Committee, *i.e.*, independent entities that develop an advisory relationship with the President or with a federal agency. Finally, in order to make that intent crystal-clear, the definition of advisory committee was amended in conference to explicitly provide that all committee which are "established or utilized" by the executive branch are within the coverage of the statute. H. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 9 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3509.

D. Appellees' Statutory Arguments Are Groundless.

In an effort to avoid the seemingly inevitable conclusion that the ABA Committee is subject to FACA, the Justice Department and the ABA have raised several arguments, none of which has merit. First, the Department argued below that Congress "has given absolutely no indication in the FACA or its legislative history that it contemplated that FACA would apply" specifically to the ABA Committee. Def. Mem. at 21; *see also* ABA Mem. at 20. However, since Congress crafted FACA as a comprehensive, remedial statutory scheme, it obviously did not need to shoulder the herculean burden of enumerating each and every committee that would be covered by the law, just as it did not specify in the Freedom of Information Act every document that would be subject to that statute. Rather, it drafted a broad statutory definition of advisory bodies that are subject to the Act and referred, in the legislative history, to a few representative examples of committees that are covered, including the Advisory Council on Federal Reports, which is virtually identical in form to the ABA Committee. In this legislative and statutory context, it does not assist appellees in the slightest that the ABA Committee is not one of the few specific committees mentioned in FACA's legislative history, especially since Congress recognized that "[o]ver 2,600 interagency and advisory committees exist today and it is possible that this figure could be as high as 3,200." 117 Cong. Rec. 17,070 (1971) (Statement of Sen. Roth), *reprinted in* Source Book at 139.

To the contrary, as the district court observed, it is far more probative that appellees have been unable to "point[ ] to any indication that Congress intended *to exempt* the ABA Committee from FACA." App. 9a n.23 (emphasis in original). Rather than list each and every committee covered by FACA, Congress enumerated, in the statute itself, those few advisory bodies that are *not* covered by the law, *i.e.*, committees of the Central Intelligence Agency and the Federal Reserve System, as well as "any local civic group whose primary function is that of rendering a public service . . . ." 5 U.S.C. App. II § 4(b), (c). Thus, if it is true that Congress was "obviously aware of the ABA's longstanding involvement in the judicial nomination process," as the Justice Department asserted below, Def. Mem. at 21, the necessary conclusion is that Congress deliberately chose not to exclude it from FACA.

The second statutory argument that has been advanced by appellees is even more strained. The Department has essentially contended that the courts may ignore the language, legislative history, and GSA interpretation of FACA, and instead find that the ABA Committee is not covered by the statute, simply because it does not, according to appellees, involve "private special interest groups' excessive influence over federal agencies with regulatory authority or control over matters of direct concern to those groups." Def. Mem. at 12-13; *see also* ABA Mem. at 19 ("the Committee is not a narrow special interest group out to promote its particular viewpoint to a federal agency with regulatory responsibility over that group").

Even if the Court were free to disregard the statutory language itself, the Department's argument does not accurately reflect the congressional objectives underlying FACA. As the district court found, "Congress' purpose was much broader" than simply regulating a narrow class of advisory committees that are dominated by "special interest groups." App. 12a. To the contrary, the Senate Report stated that the overall purpose of the Act is to "prescribe certain standards and procedures governing the establishment and operation of advisory committees in the Federal government," which obviously applies as much to the ABA Committee as it does to any other advisory body that is established or utilized by the government. S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972). The Senate Report also explained that the purpose of the law is to

> strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose; provide uniform standards for the creation, operation, and management of such committees; provide that the Congress and the public are kept fully and currently informed as to the number, purposes, membership, and costs of advisory committees, including their accomplishments, and assure that Federal advisory committees shall be advisory only.

Id. The House Report contains a similar description of the statute's objectives. *See* H.R. Rep. No. 1017, 92d Cong., 2d Sess. 1 (1972). Once again, each of these Congressional interests will be furthered if FACA is applied to the government's use of the ABA Committee. Just as the FOIA applies to the records of all executive branch agencies — not simply those agencies that are engaging in illegal or improper conduct — FACA's basic standards of public accountability cover all entities that develop a preferred, ongoing advisory relationship with executive agencies — not simply those composed of special interest groups that are exerting improper influence on governmental policy.[3]

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[3] If Congress' sole interest was in regulating advisory relationships that involve an actual or potential conflict of interest, then it could simply have enacted section 5(b) of FACA, which provides that advisory committees should not be "inappropriately influenced . . . by a special interest" and must be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. II § § 5(b)(2), (3). Because FACA was not so limited, it seems plain that Congress intended that all advisory committees would *both* avoid conflicts of interests and comply with FACA's other administrative and procedural requirements.

Moreover, this is the interpretation of FACA which the government has — until now — consistently given to the law. Thus, numerous advisory bodies that have been established and that have complied with FACA pose far less of a potential than exists here for "private special interest groups' excessive influence over federal agencies." Def. Mem. at 13. To take one notable example, the President's Special Review Board, otherwise known as the Tower Commission, was established to analyze the activities and procedures of the National Security Council and provide recommendations directly to the President. Certainly, former National Security Adviser Brent Scowcraft, former Senator John Tower, and former Secretary of State and Senator Edmund Muskie — the Commission's members — were not attempting to exert "influence over federal agencies with regulatory authority" over them, *id*, yet that did not stop the government from treating their advisory functions as subject to FACA. *See* 51 Fed. Reg. 43,718 (1986).[4]

* * * * *

Although the district court was "cognizant of its duty to 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided,'" App. 14a, *quoting Int'l Ass'n of Machinists v. Street*, 367 U.S. 740,

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[4] In its response to appellants' jurisdictional statement, the ABA suggested, for the first time, an additional statutory argument, *i.e.*, that the Committee's ratings do not constitute "advice or recommendations" within the meaning of the statute. ABA Mem. at 17. This argument is apparently based on the proposition that "[e]ven when the ABA Committee finds that a prospective nominee is 'not qualified,' it does not recommend that the nominee be removed from consideration." *Id.* at 17 n.14. Obviously, however, a statement that a particular individual is or is not "qualified" to be a federal judge constitutes "advice" under any reasonable construction of that term. In fact, the ABA's answer to plaintiff-intervenor's complaint "admits that the ABA Committee investigates and evaluates prospective federal judicial nominees and *advises* the Department of Justice of these evaluations." J.A. 64 (emphasis added).

749-50 (1961), it recognized that it could not "press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985), *quoting George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). In view of FACA's plain language, legislative history, underlying purposes, construction by GSA, and longstanding interpretation by the courts, nothing short of "disingenuous evasion" would enable the Court to avoid the constitutional issues raised by appellees, to which we now turn.

II. THERE IS NO CONSTITUTIONAL BARRIER TO THE APPLICATION OF FACA TO THE ABA COMMITTEE.

A. The Appointments Clause Does Not Prohibit The Application Of FACA's Requirements To The Justice Department's Use Of The ABA Committee.

1. The district court's holding that the Appointments Clause prohibits the application of FACA to the ABA Committee has no grounding in the language of the Clause itself or in rulings of this Court. According to the district court, there is a constitutional infirmity because the legislative branch has "intervene[d] in the Executive's selection process for judicial nominees," and that action is "directly" forbidden by the "text of the Constitution." App. 19a. This proposition is in error for several reasons.

First, the legislative branch has done nothing beyond enacting FACA, and has reserved for itself no role whatsoever in that statute's execution. *Compare Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not control execution of the laws except through Article I procedures). Indeed, the implementation of the Act's procedural requirements is delegated to the very executive branch agency that uses the advisory committee (here, the Justice Department), a factor found to be of considerable importance in the Court's decision to sustain the statutes at issue in *Morrison v. Olson*, *supra*, 108 S. Ct., at 2621, and *Nixon v. Administrator*, *supra*, 433 U.S., at 441.

Accordingly, this case simply does not pose the "danger of the Legislative Branch's accreting to itself judicial or executive power . . .." *Mistretta v. United States*, slip op. at 21. Indeed, FACA does not even go so far as to "commingle the functions of the Branches" in the implementation of the law, although statutory schemes doing so have been sustained by the Court so long as they do not pose the danger of legislative usurpation. *Id.* (upholding the involvement of judges in rulemaking); *Morrison*, *supra*, 108 S. Ct., at 2614 (upholding role of special court in creating and terminating office of independent counsels); *Commodity Futures Trading Comm'n v. Schor*, *supra* (upholding agency's assumption of jurisdiction over common-law counterclaims).

Second, it is difficult to understand what the district court meant by "interven[tion] in the Executive's selection process" since the district court never explained which specific aspects of FACA would "intervene" in the nomination process and in what manner. While a law that attempted to control directly the President's choice of judicial nominees might impermissibly intrude on his appointment power, FACA is certainly not such a statute. Thus, FACA does not circumscribe in any way who the President may appoint as a federal judge, but merely imposes on the Justice Department's use of the ABA Committee the same standards of public accountability that are imposed on the use of every federal advisory committee.

Finally, the district court stated that the basis for its decision was the actual text of the Appointments Clause, which provides, in relevant part, that the President "shall nominate . . . Officers of the United States," including federal judges, "by and with the Advice and Consent of the Senate . . .." U.S. Const. art. II § 2, cl. 2. However, there is nothing in FACA's design or structure that deprives the President of his authority under the Clause or assigns to Congress any role whatsoever in the nomination process. Again, the district court never explained which part of this Clause is violated by any part of FACA. In the absence of such a connection, the finding of unconstitutionality cannot stand.

2. The district court attempted to buttress its reading of the Appointments Clause with a statement made by Alexander Hamilton in *The Federalist*. App. 16a—17a. However, not only does this statement provide no support for the district court's approach to the Clause but, more importantly, when the full views of Hamilton and the other Framers are considered, they clearly coincide with the public accountability objectives that underlie FACA.

During the constitutional convention, much consideration was given to allowing the Senate to make judicial appointments by itself, without any involvement by the President. Thus, on July 18, 1787, the Convention discussed Resolution 11, which was entitled "The Judges to be Appointed by the 2d branch of the National Legislature." 2 M. Farrand, *The Records of the Federal Convention* 41 (2d ed. 1937). This resolution was opposed by some, not because it was thought that the President had a more direct and legitimate interest in judicial appointments than did Congress, but because the "Executive would certainly be more answerable [to the public] for a good appointment, [just] as the whole blame of a bad one would fall on him alone." *Id*. at 42. Those who favored appointment by the legislature contended, on the other hand, that the legislature "[b]eing taken from all the States . . . would be best informed of characters [and] most capable of making a fit choice." *Id*. at 41.

On July 21, James Madison made a motion to assign the power of judicial nomination to the President and to require two-thirds of both houses of the Congress to reject a nominee. There was substantial objection to this motion on the ground that it did not afford Congress a sufficient role in the process, and, concomitantly, that it would give the President excessive "influence over the Judiciary department itself." 2 M. Farrand, *supra*, at 83. Not only did Madison's motion fail, but the resolution for the direct appointment of judges by the Senate was passed by a 6 to 3 vote. *Id*. A month later, the Committee on Detail codified this resolution in its proposed constitution, assigning the sole power of judicial appointments to the Senate.

In August and September, however, the "Committee of eleven" revisited the question of judicial appointments and proposed to the Convention a compromise between appointment by the Senate and the Madison motion. On September 4, the Committee of eleven proposed that the "President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . Judges of the supreme Court," and this proposal was approved on September 7 by a unanimous vote. 2 M. Farrand, *supra*, at 495, 533. Although there is no record of the deliberations of the Committee of eleven which resulted in the current language of the Appointments Clause, *The Federalist* provides some insights into the rationale underlying the compromise reached by the Framers. Hence, the Hamilton article highlighted by the district court suggests that the principal rationale for assigning the nomination power to the President was one of public accountability: "[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation . . . In the act of nomination, his judgment alone would be exercised . . .." *The Federalist* No. 76, at 492-93 (E. Earle ed. 1937). This article also emphasized, however, the "powerful" role to be played in the process by the Senate, as well as the expectation that the advice and consent process would "be an excellent check upon a spirit of favoritism in the President . . .." *Id*. at 494.

In a sequel to this article (No. 77), Hamilton further expounded on the need for public accountability in the judicial appointment process, and he directed considerable criticism at the practice that existed in various states of making judicial appointments by private committees not subject to any public scrutiny:

> The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination . . .; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed . . . And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost . . . .
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> Such council would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council . . . would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease in stability in the administration of government, and a diminution of the security against undue influence of the Executive.

Id. at 500.

There is nothing, therefore, in either the constitutional debates themselves or in *The Federalist*, that suggests any constitutional defect in a statute such as FACA. To the contrary, these materials directly support the constitutionality of the Act in two distinct, but related, ways. First, the Framers were greatly interested in ensuring public accountability so that the public would be able to understand how any particular judicial appointment was made and assign responsibility accordingly. This certainly coincides with the objectives of FACA, which, as noted earlier, seek to ensure that governmental advisory bodies, consisting of private individuals who are not otherwise accountable to the public, are held to minimum standards of public access and accountability. *See supra* at 23-24. Indeed, Hamilton's critique of "appointment councils" which acted without "public inspection" and had an "undue influence on the executive," recites the very evils that FACA was enacted to eliminate.

The second, related theme is that the Framers expected the Senate to play an informed, substantial role in determining whether to lend its consent to any particular nominee. Since the ABA Committee's recommendations have become a vital link in the chain of appointment, and are used by the Senate itself in reviewing nominations, a statutory scheme that furthers the Senate's understanding of the role and processes of the ABA Committee will certainly place the Senate in a better position to perform its advice and consent function effectively. Since FACA in no way deprives the President of his power to nominate federal judges, but, at the same time, promotes both public accountability and the Senate's ability to function as a meaningful check, the Act would seemingly have been greeted with approval by the Framers — not the approbation incorrectly imputed to them by the district court.

3. The district court's approach to the Appointments Clause not only lacks any foundation in the language or history of the Clause itself, but it also creates serious constitutional anomalies. In essence, the district court concluded that, because the Constitution gives the Senate an express role in the appointments process through the advice and consent function, Congress has *less* power to enact a general regulatory scheme that indirectly affects that process than it would otherwise have. App. 19a. This approach threatens to insulate from general legislative regulation all matters in any way related to the nomination process, as well as all matters bearing on the treaty making process, which is also subject to Senate approval. More importantly, it is con-

trary to the approach taken by this Court in both *Morrison* and *Nixon v. Administrator.*

In *Morrison*, the Court rejected the Justice Department's argument that Congress is prohibited from enacting laws that control the prosecution power simply because the President is assigned the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. In other words, the Court found that the fact that the Constitution explicitly gives the President, but not Congress, a role in ensuring that the laws are faithfully executed does not, by itself, impose a barrier to duly-enacted legislation affecting the prosecutorial power. Similarly, although Congress has no express constitutional function in preserving and providing public access to the materials of former Presidents, this Court did not strike down the Materials Act as exceeding Congress' authority in *Nixon v. GSA*. If Article I authorizes Congress to enact statutes bearing on matters in which Congress has no express constitutional role — as the Court ruled in *Morrison* and *Nixon* — it is difficult to understand why Congress may not enact a general law that indirectly bears on the power of appointment, in which the Senate is given an explicit responsibility.

4. By incorrectly viewing the Senate's advice and consent power as a limitation on Congress' general authority to legislate, the decision below necessarily calls into question the constitutionality of a host of other statutory schemes that indirectly impact on the nomination process. For example, the D.C. Circuit has held that the Freedom of Information Act applies to questionnaire responses obtained by the Department of Justice from Senators, explaining the Senators' procedures for selecting and recommending potential judicial nominees, as well as information regarding individuals actually nominated. *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). The court unanimously rejected the Justice Department's argument that the responses should not be subject to the FOIA because the "nomination of judges is a purely presidential function . . . and . . . the President's choice to draw the Attorney General into this presidential activity should not make the responses disclosable." *Id.* at 788. However, under the district court's reasoning, the Freedom of Information Act cannot constitutionally be applied to the questionnaires at issue in *Ryan* or, for that matter, to *any* documents linked to the nomination process, whether they are in the possession of the Justice Department, the Federal Bureau of Investigation, or another federal agency covered by the FOIA.[5]

The district court's formalistic approach also necessarily calls into question whether the various safeguards and requirements of the Privacy Act, 5 U.S.C. § 552a, can constitutionally be applied to materials regarding prospective judicial nominees. If "the legislative branch cannot intervene" in the nomination process in any fashion, as the district court ruled (App. 19a), then Congress cannot require the Department to maintain information regarding individuals under investigation "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness," *id.* § (e)(5), or afford such individuals civil remedies, including the right to seek amendment of inaccurate records, if these or other safeguards of the Privacy Act are violated by Justice Department employees. *Id.* § (g). In essence, the district court's erroneous analysis of the Appointments Clause not only invalidates the application of FACA to the ABA Committee, but it also improperly casts a cloud of unconstitutionality over all other general statutory schemes that may bear, either directly or indirectly, on the nomination process. There is nothing in the text of the Clause, its history, or the cases construing it that requires any such wholesale undermining of congressional authority.

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[5] Under the approach taken by the district court, if the ABA or anyone else had comparable committees to advise on Ambassadors, Department Heads, or other appointments within the executive branch, the application of FACA, FOIA and similar statutes to these committees would also be unconstitutional. Indeed, any records collected in connection with any prospective nomination for any officer covered by the Appointments Clause would be immune from disclosure as a matter of constitutional law.

B. General Separation Of Powers Principles Do Not Prohibit The Application Of FACA To The ABA Committee.

1. The district court also found that the application of FACA to the ABA Committee would violate general separation of powers principles, presumably by " 'impermissibly undermin[ing]' the powers of the Executive Branch . . . or 'disrupt[ing] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions . . ..''' *Morrison v. Olson, supra*, 108 S. Ct., at 2621, *quoting Commodity Futures Trading Comm'n v. Schor, supra*, 478 U.S., at 856 (1986), and *Nixon v. Administrator, supra*, 433 U.S., at 443. Once again, however, the court below pointed to no specific way in which FACA would undermine the executive branch, but, rather, simply asserted, without any explanation, that FACA creates a "significant potential for disruption of the President's constitutional prerogative . . .." App. 20a.

As with its approach to the Appointments Clause, the district court's analysis of the separation of powers doctrine cannot withstand scrutiny. In the first place, there is no way that FACA, which was signed into law by President Nixon and has been applied by the executive branch to literally thousands of advisory committees over the past 17 years, "can possibly be construed as preventing the [Executive] Branch 'from accomplishing its constitutionally assigned functions . . ..''' *Mistretta, supra*, slip. op. at 34, *quoting Nixon v. Administrator, supra*, 433 U.S., at 443. Indeed, in contrast to *Morrison*, where it was "undeniable" that the independent counsel provisions of the Ethics in Government Act reduced the power of the Attorney General and the President to some extent, *see* 108 S. Ct., at 2621, there is no basis for concluding that any of FACA's requirements will impair the Justice Department's utilization of the ABA Committee at all, let alone that *all* of these requirements will invariably cause

a significant impairment, as the Justice Department argued and the district court held. Moreover, rather than focusing on those specific, threshold requirements of the statute that necessarily would be triggered by a finding that the Department's use of the Committee is subject to FACA, the district court considered provisions whose meaning, as applied to the ABA Committee, has not been defined by either the Justice Department or the courts, and whose potential for interference with the nominating process is, therefore, speculative and not ripe for review.

As noted earlier, if the Committee is covered by FACA, only three events will definitely occur: (1) the Department will be required to prepare a charter for the Committee that will inform the public of the Department's position regarding the purpose, function, and method of operation of the Committee, 5 U.S.C. App. II § 9(c); (2) the Department will designate a committee management officer who will be responsible for maintaining the records of the Committee, attending Committee meetings, ensuring that accurate records are kept of the Committee's business, and supervising overall compliance with FACA, *id.* § 8; and (3) the Department will provide the public with advance notice of all Committee meetings. *Id.* § 10(a)(2). The Justice Department has not argued, and the district court did not hold, that these administrative requirements alone would impair the President's nominating authority. Indeed, any such claim would border on the frivolous in light of the fact that even an advisory body like the Tower Commission was able to comply with these requirements, while conducting its extraordinarily sensitive investigation of the Iran-Contra affair. *See* 51 Fed. Reg. 43,718 (1986).

Instead, in finding the entire Act unconstitutional as applied to the ABA Committee, the district court focused its dissatisfaction on the portions of FACA that provide for access to some committee meetings and documents. Such a focus is misdirected for several reasons. First, as this Court noted in sustaining the Presidential Recordings and Materials Preservation Act, which provides for public access to some of former President Nixon's materials:

> [o]f course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e.g., the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and a variety of other statutes. . . . Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy.

Nixon v. Administrator, supra, 433 U.S., at 445-46 (citations omitted). Moreover, just as the Materials Act authorizes the withholding of materials that require confidentiality on privacy or other legitimate grounds, 44 U.S.C. § 2111 note § § (b)(4), (5), the Advisory Committee Act also permits withholding on such grounds. Thus, the statute's exemptions parallel those contained in the Freedom of Information Act and Sunshine Act, two of the statutes which this Court cited with approval in *Nixon v. Administrator*.

Most important of all, the district court did not even mention the statutory exemptions that might be used by the Justice Department to safeguard from public scrutiny the very kinds of meetings and documents about which the court was concerned — *i.e.*, those focusing on the "competence, integrity, and temperament" of individuals. App. 24a. For example, the Department could properly invoke FACA's personal privacy exemption as a basis for maintaining the confidentiality of most, if not all, meetings and documents in which the credentials of individual candidates for federal judgeships are discussed. In fact, the district court even cited a Freedom of Information Act case, *Information Acquisition Corp. v. Department of Justice*, 3 GDS ¶ 83,149 (D.D.C. 1981), which squarely held that "documents collected by the FBI on a nominee for a federal judgeship" could

be kept secret under the FOIA's privacy exemption "because release would have violated substantial privacy interests . . . ." App. 22a. Yet the court below offered no explanation as to why the same exemption in FACA would not be adequate to safeguard records and meetings relating to *potential* judicial nominees, who, if anything, would appear to have a greater privacy interest than actual nominees.

Nor did the court reconcile its ruling with the fact that FACA's personal privacy exemption is routinely used by various agencies to withhold advisory committee materials focusing on the attributes and abilities of individuals. For example, the National Science Foundation, the National Endowment for the Arts and Humanities, and the National Institutes of Health, among other agencies, employ this exemption to close the meetings and withhold the documents of hundreds of peer review bodies that advise them as to whether individuals should receive federal grants and other benefits.[6] There is no relevant difference between these peer review bodies and the ABA Committee. Yet the former fully comply with FACA and still manage to maintain appropriate confidentiality, while the district court held that FACA could not be applied to the ABA Committee without violating the separation of powers doctrine.

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[6] *See, e.g.*, 53 Fed. Reg. 41,256 (1988) (National Science Foundation closing peer review discussions of "personal information concerning individuals associated with the proposals"); 53 Fed. Reg. 39,163 (1988) (same); 53 Fed. Reg. 35,939 (1988) (same); 53 Fed. Reg. 40,801 (1988) (National Foundation for the Arts and the Humanities closing peer review meeting because it will involve "information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); 53 Fed. Reg. 36,662 (1988) (same); 53 Fed. Reg. 34,837 (1988) (National Institutes of Health closing meeting "for the review of grant applications"); 53 Fed. Reg. 26,504 (1988) (same).

The only specific observation that the district court made with respect to FACA's exemptions is that the statute does not contain a general "deliberative process exemption" for advisory committee meetings and documents. App. 24a. However, the court never indicated why such an exemption is essential to the ABA Committee in light of the fact that hundreds of other advisory bodies have found the statute's existing exemptions to be adequate to protect material that requires secrecy. Indeed, since the ABA Committee's primary function — investigating and assessing the qualifications of individuals — directly implicates FACA's personal privacy exemption, the Committee would appear to be in far less need of a general deliberative process privilege than many, if not most, other advisory bodies.

Moreover, the district court not only failed to focus on FACA's actual exemptions, but it also overlooked the fact that the determination of whether to invoke them is committed to executive branch officials. Therefore, the public could gain access to a specific meeting or document of the ABA Committee only if the Justice Department itself decided not to claim an exemption, or if a court rejected such a claim in a specific case. Rather than presume that FACA's various requirements and exemptions would be applied by the Justice Department and interpreted by the courts in a sensible manner, consistent with legitimate interests in privacy and confidentiality, the district court simply leapt to the unwarranted conclusion that necessary confidentiality could not be maintained under FACA.[7]

2. Since there is no basis for concluding that the application of FACA to the ABA Committee will actually impair the Justice Department's ability to use the Committee at all, the district court should have rejected the Department's across-the-board constitutional assault without even scrutinizing the specific congressional purposes served by the Act. *See Morrison v. Olson, supra,* 108 S. Ct., at 2621-22; *Nixon v. Administrator, supra,* 433 U.S., at 443 ("[o]nly where the potentional for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress"). But, even if the interests advanced by FACA are needed to justify the statute's procedural requirements, the district court wrongly assumed that those interests are entirely coterminous with the purpose served by the constitutional confirmation process — *i.e.*, allowing the Senate to pass on individual judicial nominees — and as such are redundant and entitled to no weight in the constitutional calculus. Once again, neither the district court's premise nor its conclusion is correct.

The application of FACA to the ABA Committee may indeed assist the Senate in reviewing nominees for federal judgeships, specifically by shedding additional light on the process by which the Committee arrived at its rating. Just as clearly, however, FACA was not enacted solely or even significantly to facilitate the Senate's advice and consent function. Instead, like such statutes as the FOIA and the Sunshine Act, it is a comprehensive, prophylactic measure that is intended to establish basic standards of accountability and openness for all governmental advisory bodies, such as the ABA Committee, that have a significant effect on the public. Certainly, the fact that the FOIA may also assist in the confirmation process does not mean that it is unconstitutional as applied to all documents relating to that process.

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[7] The district court's approach to this and other issues may have been influenced by the Washington Legal Foundation's ideologically-based attack on the ABA Committee, which was made explicit in the complaint filed by WLF in its earlier lawsuit against the ABA Committee. *See Washington Legal Foundation v. ABA*, 648 F. Supp. 1353, 1355 (D.D.C. 1986) ("WLF contends that the Committee's investigations 'have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology.'") (quoting Complaint ¶ 26). In that lawsuit, WLF requested as relief that it be granted access to all Committee meetings and even went so far as to suggest that the Committee should be reconstituted by the district court along ideological lines. *Id.*

In this Court, WLF has again emphasized its dissatisfaction with the ABA Committee, and has erroneously suggested that the application of FACA would provide for wholesale access to the Committee's meetings and documents. *See* WLF Jurisdictional Statement at 18 (claiming that "examples of ABA Committee abuse abound" and asserting that "appellant and other members of the public are less than sanguine about the integrity [of the Committee's] closed-door screening process"). However, neither WLF's extreme and unrealistic requests for relief under FACA, nor its underlying motivation for filing this case, should affect the Court's assessment of whether FACA's requirements and exemptions can be applied in a sensible fashion, consistent with the Committee's legitimate interests in confidentiality.

In addition, the interests served by applying FACA here are much broader than the district court assumed. As in all situations where the executive branch relies heavily on the work of an advisory committee, the public has a strong interest in having the Justice Department file a charter describing the Department's view of the ABA Committee's precise function and role, as well as the general criteria that are used by the Committee in assessing prospective judicial nominees. And while meetings and documents discussing individuals who are being evaluated may generally be closed to the public under FACA's exemptions, the public should be able to gain access to the Committee's general discussions of, for instance, the extent to which it should scrutinize the legal philosophy or political ideology of potential judicial candidates.

Likewise, if the Department complied with FACA, the public could learn more about the procedures the Committee uses to investigate and evaluate judicial candidates, as well as such matters as the manner in which the Committee votes on ratings. The public's strong interest in learning about the overall functioning, role, and influence of the ABA Committee is precisely the kind of interest that impelled Congress to enact FACA to regulate advisory committees generally. It is an interest that is not satisfied by the Senate's scrutiny of specific nominees, and neither the Justice Department nor the district court has offered any reason why that interest cannot be furthered by applying FACA to the ABA Committee.

Moreover, the district court overlooked the fact that the Senate only performs its advice and consent function if an individual is actually nominated. When an individual is not nominated either because of a "not qualified" rating by the ABA Committee or for some other reason, the Senate's advice and consent role obviously is not triggered. Nevertheless, the ABA Committee may wield enormous influence over governmental decisionmaking in such situations, and hence there is a vital interest in ensuring that it complies with FACA's basic standards of public accountability. Thus, although FACA's personal privacy exemptions would probably allow the Department to withhold from the public all meetings and documents discussing specific individuals who are not ultimately nominated, the public should be able to learn more about the process the Committee employs to determine whether an individual is "not qualified," as well as the general considerations that underlie such a rating. In this way, the individual candidate's privacy interests would be protected, yet the public (and the Congress) would be better equipped to assess the role played by the Committee when it declares someone "not qualified" to be a federal judge.

Finally, the fact that the Senate "has the opportunity to question a representative from the ABA Committee" during Senate confirmation hearings does not, as the district court seemed to believe, distinguish the ABA Committee from other executive branch advisory bodies. App. 25a. Many influential advisory committees, such as the Tower Commission, the Grace Commission, and the Rogers Commission on the Challenger disaster, to name just a few, have been called on by both houses of Congress to explain their views and recommendations. The Justice Department has never argued that FACA may not constitutionally be applied to these committees simply because Congress had the "opportunity to question a representative" from them. App. 25a.

It is clear, therefore, that the Senate's ability to solicit testimony from one or more members of the ABA Committee has nothing to do with whether FACA's application to the Committee would further significant legislative interests. App. 25a.

C. There Is No First Amendment Barrier To A Ruling That FACA Applies To The Justice Department's Use Of The ABA Committee.

Finally, the ABA argued in its response to appellants' jurisdictional statements that FACA cannot be applied to the Department's use of the ABA Committee without violating the First Amendment rights of the members of the Committee. This argument should be rejected for a number of reasons. To begin with, although the ABA has been cognizant of this case since its inception, it did not participate before the district court, and, for that reason, the court never addressed the First Amendment issue. Ordinarily, this Court will consider only issues that have been raised and resolved in the lower federal courts. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 8-9 (1948). While this principle may occasionally yield "where injustice might otherwise result," *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), there is no reason to invoke that exception here.

To the contrary, since the ABA had raised its First Amendment argument in the prior FACA lawsuit filed by WLF — a lawsuit that was dismissed on the basis of the ABA's alternative argument that it was not a proper party in a FACA lawsuit — it is apparent that the ABA made a deliberate, tactical decision in this case not to present its First Amendment argument to the district court. The ABA should not be permitted to bypass lower court resolution of an argument and then press it before this Court.

Moreover, even if the Court were to entertain the ABA's First Amendment claim, it has no merit for the reasons articulated by the D.C. Circuit in one of the early FACA cases, *Center for Auto Safety v. Cox, supra*. In that case, AASHTO, which was being utilized as an advisory committee by FHWA, advanced precisely the same argument that the ABA Committee is making here, *i.e.*, that the "application of FACA . . . to independent organizations [like AASHTO] acting as spokesmen for their members" would "interfere with first amendment freedoms." 580 F.2d at 694. Judge Robb, writing for a unanimous court, found "no 'serious constitutional problems inherent in the application of FACA' . . . to independent organizations." *Id.* at 694, *quoting* AASHTO Br. at 31. The reasons advanced by Judge Robb to support this conclusion are correct, and they require rejection of the ABA's claim here.

First, the D.C. Circuit explained that FACA "does not regulate AASHTO; it regulates the *FHWA's use of AASHTO as an advisory committee.*" *Id.* at 693 (emphasis added). Thus, as the ABA itself tacitly conceded in moving to dismiss the earlier FACA action filed against it, FACA's provisions do not impose any obligations on independent organizations like the ABA, which "remain free to communicate their views" to the government and "free to lobby" the government on any issue they please. *Id.* at 694. Rather, the statute is directed at the government itself, and it is triggered only when a "federal executive official utilizes an advisory committee to assist him in discharging his responsibilities" — by affording the members of the committee special access to government information, and giving the committee's views special prominence in government decisionmaking. *Id.* As summarized by Judge Robb, "[t]he issue then, is not whether the application of FACA to independent organizations offends the rights of those organizations to communicate with the government; it is whether the Administrator [of the FHWA] has in this case 'utilized' [the organization] as an advisory committee." *Id.*

There is an even more basic reason why there is no infringement of First Amendment rights here. If an organization desires to be treated *more favorably* by the government than other members of the public — as is the case with an organization that agrees to be used as an advisory committee — then it is not unconstitutional to subject its relationship with the government to minimum standards of openness and accountability. As the D.C. Circuit found in *Center for Auto Safety*, since AASHTO had received advance access to, and an opportunity to influence, the FHWA's draft proposed rulemakings — access and influence which had been denied other members of the public — the First Amendment gave it no right to avoid the requirements of FACA. 580 F.2d at 694. Likewise, since the ABA Committee is the only organization that is permitted to have advance notice of potential nominees, and it is the only organization whose views on nominees are routinely solicited and incorporated into the nomination process, it should not be heard to complain about the procedural requirements on which Congress has conditioned this sort of intimate involvement in government decision-making. Stated simply, if an organization accepts the benefits of being utilized as a federal advisory committee, there is nothing unreasonable — or, more importantly, unconstitutional — in requiring it to accept the accompanying responsibilities and procedural restrictions that this status entails.

In this connection, a hypothetical helps place the ABA Committee's First Amendment argument in context. Assume that instead of appellants pressing the FACA issue, the Justice Department had approached the ABA and said that it would no longer use the ABA's Committee as an advisory committee unless the Committee agreed to be chartered and otherwise comply with FACA. It is apparent that the Committee would not have a First Amendment right to insist that the Department continue to use it as an advisory committee *without* complying with FACA's chartering and other requirements. The only difference between that scenario and the one before the Court is that the FACA issue is being raised by appellants rather than the government, and that distinction has no bearing on the ABA's First Amendment claim.

Finally, the restrictions placed on the Department's use of the ABA Committee in this case are, if anything, less onerous than

those imposed on the government's use of the advisory committee at issue in *Center for Auto Safety*. As the D.C. Circuit noted, the application of FACA to the FHWA's use of AASHTO meant that most of the communications between the government and AASHTO would have to be undertaken "openly and publicly," since no exemption from FACA's openness requirements was applicable there. 580 F.2d at 694. In stark contrast, it is apparent that here, most, if not all, of the ABA Committee's discussions of particular judicial nominees could be kept confidential under the exemptions to the Act. Accordingly, there is simply no substance behind the ABA's rhetoric that the application of FACA will "destroy[ ] the confidentiality of the ABA Committee's evaluation process and chill[ ] speech on matters of public concern . . . ." ABA Mem. at 14. At bottom, the ABA's First Amendment argument, just like the Justice Department's separation of powers claim, is predicated on a wildly unrealistic vision of FACA, rather than a reasonable appraisal of the statute's actual provisions, which can be, and have been, applied in a manner that can easily accommodate any genuine need for secrecy and confidentiality.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling that the Justice Department's utilization of the ABA Committee is subject to FACA, but should reverse the district court's decision declaring that FACA cannot constitutionally be applied to the Department's use of the Committee.

Respectfully submitted,

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January 28, 1989

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*The assistance of Deanne Ross, a third year student at the Northeastern University School of Law, is gratefully acknowledged.

APPELLANT'S BRIEF

(U)

Supreme Court, U.S.
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No. 88-494 (B)
(Consolidated with No. 88-429)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

BRIEF OF APPELLANT

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QUESTION PRESENTED

Did the district court, in correctly ruling that the American Bar Association's Standing Committee on the Federal Judiciary "fits squarely" within the definition of an advisory committee under the Federal Advisory Committee Act ("FACA"), nevertheless err in ruling that none of FACA's provisions may be constitutionally applied in this case because all such provisions would violate the separation of powers by interfering with the Executive's nomination power under Article II, especially where there was no record evidence suggesting that the application of any provision of FACA would in fact disrupt the nominating process in any way?

PARTIES TO THE PROCEEDINGS BELOW

Appellant Washington Legal Foundation was the plaintiff below. Appellee United States Department of Justice was the defendant. Appellee American Bar Association intervened as a party defendant after the judgment was entered solely for purposes of participating in this appeal. Public Citizen intervened as a party plaintiff below and filed a separate appeal in No. 88-429. Both appeals were ordered consolidated on December 5, 1988. *See* 109 S.Ct. 527 (1988).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-494

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANT

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia are officially reported at 691 F.Supp. 483 (D.D.C. 1988) and are reproduced in Appendix A annexed to the jurisdictional statement (J.S.) filed in No. 88-429 (App. 1a-28a).[1]

JURISDICTION OF THIS COURT

This is an appeal from the final judgment of the United States District Court for the District of Columbia, entered on August 8, 1988, granting appellee U.S. Department of Justice's motion to dismiss, or in the alternative for summary judgment, dismissing appellant's motion for summary judgment, and dismissing the action. App. 27a-28a.

---

[1] "App." refers to the Appendix in No. 88-429; "J.A." refers to the Joint Appendix.

Notice of appeal from that decision was filed by appellant on August 26, 1988 and its jurisdictional statement was filed on September 22, 1988. Probable jurisdiction was noted on December 5, 1988, and this and a similar appeal filed by Public Citizen in No. 88-429, were consolidated. 109 S.Ct. 527 (1988). Because the district court declared an Act of Congress unconstitutional as applied in a civil action to which the United States Department of Justice, an agency of the United States, was a party, this Court has exclusive jurisdiction under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 8, cl. 18 states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2, provides in pertinent part that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. III, § 1 states in pertinent part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Federal Advisory Committee Act, 5 U.S.C. App. II, is reproduced in App. 31a-45a.

STATEMENT OF THE CASE

Appellant seeks reversal of the lower court ruling which held that, although the American Bar Association's Standing Committee on Federal Judiciary constitutes an advisory committee under the Federal Advisory Committee Act because the Department of Justice utilizes it as a source of advice on the qualifications of potential judicial nominees, the application of FACA to that Committee would violate the separation of powers principle in that the Act has the potential for interfering with the President's appointment power (App. 27a). Since this Court must consider the statutory issue anew before it passes on the constitutional issue, appellant will brief both. In addition, appellant will briefly address the First Amendment issue raised by the American Bar Association in the Answer it filed after the judgment was entered in this case, but which was not passed upon by the court below. Appellant will also address the lower court's failure to allow discovery.

1. The Federal Advisory Committee Act

The Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), was enacted in 1972 by the Congress to regulate the operation of the thousands of advisory committees composed primarily of private citizens and "established or utilized" by the President, Executive branch agencies, and officials. *Id.*, §§ 2, 3 (App. 31a-32a). As an "open government" law, FACA is essentially an amalgam of the Freedom of Information Act, 5 U.S.C. 552 *et seq.*, and the Government in the

Sunshine Act, 5 U.S.C. 552b *et seq.*, *see* FACA, § 10 (App. 41a), and is therefore designed to promote and ensure integrity and accountability in the governmental decision-making process.

Just like other "open government" laws, FACA does not interject the Congress into any operation of the Executive branch. Rather, FACA, like the FOIA, leaves the execution and the administration of the laws with the Executive branch. The General Services Administration (GSA), an agency within the Executive branch, has promulgated regulations governing the operation of all advisory committees. *See* 41 C.F.R. Subpart 101-6.10. The "beneficiaries" of such laws are the public at large and those particular individuals and organizations who wish to obtain certain advisory committee documents or attend certain advisory committee meetings, subject to the exemptions from disclosure provided by both FOIA and the Sunshine Act, which exemptions are incorporated in FACA, §§ 10(b), 10(d).

The only role Congress provided for itself under FACA is an incidental one: charters of advisory committees must simply be filed with the appropriate "standing committees of the Senate and of the House of Representatives" having oversight of the agency utilizing the advisory committee. FACA §§ 5(a), 9(c) (App. 33a, 40a). Indeed, FACA expresses Congress' concern that advisory committees be advisory only and that they should not encroach upon or usurp the Executive's substantive decision-making powers. FACA, § 9(b) (App. 39a-40a).

While most litigation under FACA involves disputes over the operation of advisory committees "established" as such by the Congress, the President, or an agency -- such as disputes over the invocation of an exemption to keep a particular meeting closed -- other FACA litigation, such as the instant case, involves disputes about whether a particular private group being "utilized" by the Executive branch constitutes an "advisory committee" in the first place and is thus subject to FACA's requirements. *See, e.g., National Nutritional Foods v. Califano*, 603 F.2d 327 (2d Cir. 1979) and other cases cited in the district court's opinion at App. 8a-11a.

2. ABA's Advisory Role With The Department Of Justice

The American Bar Association is an unincorporated association to which less than half of all American lawyers belong, and is classified as a "business league" exempt from taxation under 26 U.S.C. 501(c)(6). *United States v. American Bar Endowment*, 106 S.Ct. 2426, 2428(1986). Since 1952, the ABA's Standing Committee on Federal Judiciary, currently composed of 15 members hand-picked by the ABA's President, has screened judicial candidates for the federal bench at the behest of the Department of Justice (DOJ), by investigating them, evaluating their qualifications, and advising the Justice Department as to their suitability for positions on the federal district courts and courts of appeals (App. 10a).[2] The exact functions carried out by the ABA Committee, and its interplay with the Department of Justice, the President, and outside groups, has not been precisely determined in this litigation because of the absence of any discovery in this case and its predecessor, *Washington Legal Foundation v. ABA Standing Comm. On Federal Judiciary*, 648 F.Supp 1353 (D.D.C.1986) ("*WLF I*"). Nevertheless, the general information provided by DOJ in the instant case and by the ABA in *WLF I*, while sometimes vague and conflicting, sufficiently describes the ABA's advisory role to support the lower court's conclusion that the ABA Committee is an advisory committee under FACA.

---

[2] The use of the ABA Committee by the DOJ to screen *potential* candidates for the Supreme Court has been episodic, but the ABA Committee does not consider itself foreclosed from exercising that function. *See ABA Standing Committee on Federal Judiciary: What It Is and How It Works* 7 (1983) ("*ABA Brochure*") (J.A. 49). The ABA Committee, however, provides the Senate Judiciary Committee with its assessment of *all* nominees for both the Supreme Court and lower federal courts. *Id.* For an excellent account of the advisory role that the ABA has played in the judicial screening process over the years, see J. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (1965).

According to the Declaration of Steve Matthews, Deputy Assistant Attorney General, Office of Legal Policy, the "President's federal judicial selection committee," allegedly composed of "immediate advisers to the President," selects potential nominees for a particular federal court vacancy. Matthews Dec. ¶ 7 (J.A. 21).[3] The names of potential candidates submitted to the DOJ and/or the President's federal judicial selection committee come from a variety of sources, although the Senator of the same party as the President from the state in which a district court vacancy occurs, usually proposes one or more candidates for a judicial vacancy, and historically, that Senator's choice is given preference over other candidates. *See* Grossman, *supra* at 27.

Once the candidates are pre-selected by this committee, the Assistant Attorney General, Office of Legal Policy, notifies the candidates and requires them to complete an ABA-designed Personal Data Questionnaire to be sent to him and to the ABA Committee. Matthews Dec. ¶ 8 (J.A.22). He then requests the ABA Committee to investigate and evaluate the candidates' "qualifications" and to advise him of the results. Matthews Dec. ¶ 8 (J.A.22).[4] The ABA's relationship with the DOJ in this

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[3] The exact composition of this "committee" is unclear. While it does include such Presidential advisers as the Counsel to the President, it is questionable whether certain other members of the committee, such as the Deputy Assistant Attorney General of the Office of Legal Policy of the Justice Department, can be characterized as "immediate advisers to the President." In any event, this committee does not, as a committee, advise the President of anything, but only pre-selects potential candidates for DOJ's investigation and consideration.

[4] The ABA Committee apparently does *not* communicate with or directly advise the President, the Counsel to the President, or the Attorney General. The ABA Committee instead gives its advice directly to the Assistant Attorney General, Office of Legal Policy, who is charged with the duty to "[a]dvise and assist the Attorney General and the Deputy Attorney General regarding the

regard is exclusive: no other private organization or committee is called upon by the DOJ to advise it of the qualifications of applicants for judicial posts (App. 9a).

The ABA Committee then designates one of its members from the relevant circuit to investigate the qualifications of the candidate, and to evaluate the candidate's "competence, integrity and judicial temperament," although it is unclear what these criteria mean. *ABA Brochure* 5 (J.A.47)[5]

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selection and appointment of Federal judges." 28 C.F.R. 0.23(d). *See also* Matthews Dec. ¶ ¶ 8-10 (J.A.22).

[5] WLF alleged in its Complaint that the ABA has investigated the political and ideological beliefs of various candidates. WLF Complaint ¶ 10 (J.A.7). The ABA's denial of this allegation (ABA Answer ¶ 10) (J.A.65) is suspect. The 1979 edition of *The ABA's Standing Committee On Federal Judiciary, What It Is and How It Works, reprinted in Hearings Before the Senate Comm. of the Judiciary on Selection and Confirmation of Federal Judges*, 96th Cong., 1st Sess. 106 (1979), states unequivocally: "The Committee does not attempt to investigate or report on political or ideological matters with respect to the prospective nominee." However, in the 1983 version utilized during most of the Reagan Administration, that sentence was modified to read: "The Committee does not investigate the prospective nominee's political or ideological philosophy *except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.*" *Id.* at 4 (J.A.45) (emphasis added). One wonders how the ABA Committee can determine which views are "extreme" and which are not unless it undertakes by itself, or in cooperation with other groups, to investigate the political and ideological philosophy of the candidate. This "exception" clause appears broad enough to swallow up the alleged rule that the candidate's political views are not investigated. Indeed, this sentence has been recently modified yet again. In the June 1988 version of the *ABA Brochure*, the relevant sentence now reads: "Political or ideological philosophy are not considered, except to the extent they may bear upon the other factors." *ABA Brochure* 4 (1988). It now seems that the ABA believes that even the *non*-extreme political or ideological views of a candidate can be considered in evaluating the qualifications of candidates.

For example, James L. Graham from Ohio was under consideration for a district court judgeship in that state. Despite impeccable credentials (including 15 years extensive federal/state litigation practice; American College of Trial Lawyers fellow; Ohio Board of Bar Examiners for 5 years, including being its Chairman; prolific writer and lecturer; faculty with Ohio Judicial College (for judges); pillar of community; ABA member for 24 years), Mr. Graham received the lowest "qualified" rating from the ABA Committee with a minority report indicating that he was "unqualified." The reasons for such an unexpectedly low rating appear to have stemmed from the ABA Committee's investigation of Mr. Graham's "conservative Christian" religious beliefs. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of*

That investigator conducts a number of allegedly "confidential" interviews with lawyers, judges, professors, and others, and examines the candidate's writings and other information. *ABA Brochure* 5 (J.A.47). [6]

He then prepares a "written informal report" about his investigation, and, along with the ABA Committee Chairman, makes an initial evaluation of the candidate, assigning one of four recommended ratings to him: (1)"exceptionally well qualified," (2) "well qualified," (3) "qualified," and (4) "not qualified." According to the ABA, the substance of this informal report and the initial rating are passed on to DOJ, and only the *identity* of the sources, as opposed to the information they provided, remains confidential. *ABA Brochure* 6 (J.A.48). The ABA Committee representatives may meet with DOJ officials to discuss this initial and crucial evaluation. *Id.*[7]

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the United States, Hearings Before the Committee on the Judiciary of the United States Senate, 100th Cong., 1st Sess. 924 (1987) (remarks of Senator Simpson) (questioning Judge Harold R. Tyler, Jr., Chairman, ABA Committee, about ABA's consideration of the ideology of Judge Bork and other judicial nominees). *See also Legal Times*, Dec. 15, 1986, at 1. WLF proffered below, and will refer *infra*, to other apparent abuses by the ABA Committee that FACA was designed to deter.

[6] The Matthews Declaration, however, gives no indication whatsoever that DOJ requires or regards the ABA investigation to be "confidential," or that application of FACA would disrupt the nominating process in any way. The *ABA Brochure* refers to the confidentiality of the *name* of the candidate, but admits that "public knowledge [of the candidate's name] is usually not harmful and may be beneficial in some circumstances in that it encourages investigation into the background and personal history of the prospective nominee by other persons. It is in the public interest to avoid an appointment without full information about the appointee." *ABA Brochure* 9 (J.A.52);(App. 6a, n.20). DOJ has admitted that "confidentiality" is selectively maintained, and that the underlying reasons for an ABA evaluation are "sometimes" disclosed by the ABA to DOJ, and to the Senate Judiciary Committee. *See* Defendant's Response to WLF's Statement of Material Facts, ¶ 9. (J.A.61) (App. 6a, n.20).

[7] No one, including the former chairman of the ABA Committee on Federal Judiciary, seems able to understand -- let alone articulate -- the different bases for the three qualified ratings. For example, during the 1984 confirmation hearings of James Harvie Wilkinson III for a seat on the United States Court of Appeals for the Fourth Circuit, Frederick G. Buesser, Jr., then Chairman of the ABA Committee, testified that he rated Professor Wilkinson

If the initial rating is "not qualified," the withdrawal of the candidate from any further consideration by DOJ is almost a certainty. *See ABA Brochure* 7 (J.A.49). In such a case, the candidate's name rarely reaches the President's desk for consideration.

If the initial rating of the candidate is "qualified" or better, the ABA investigator then prepares and circulates a *final*, formal written report to the full ABA Committee, which then meets to discuss the nominee and determine his final rating. (App. 6a). That rating is forwarded to the Assistant Attorney General, Office of Legal Policy, along with an indication as to whether the rating was supported by a "majority, a substantial majority or unanimous vote of the ABA Committee." Matthews Dec. ¶ 10 (J.A.22).[8]

The Attorney General then considers the ABA Committee's final recommended rating in making "*his own* recommendation of *a* candidate to the President." Matthews Dec. ¶ 4 (emphasis added) (J.A.21); Def. Statement of Material Facts, ¶ 7 (J.A.35). Thus, it is the

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merely "qualified" (the lowest of the three qualified ratings) "because, as I have said in my several letters, I believe that he has the capacity to become an outstanding appellate court judge. He was *remarkably well qualified* for that kind of work...." *Confirmation Hearings On Federal Appointments, Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. Part 3 at 330 (1984) (Statement of Mr. Buesser) (emphasis added). Apparently, in ABA jargon, "remarkably well qualified" means something less than "well qualified." Under FACA, the public, and judicial candidates, would be able to learn more of the Committee's inscrutable rating system, and the ABA would be less likely to act in an arbitrary manner.

[8] It is unclear what is meant by "substantial majority," nor is it clear whether the substance of this final report is conveyed to DOJ, or whether there is an explanation for any difference between the initial and the final rating or indeed, whether the final rating is really "final." In one such case, Judge Kenneth Porter, an experienced and respected state judge in Tennessee, received a unanimous "qualified" rating from the ABA for a federal district court judgeship and was nominated by President Reagan on July 25, 1986. Judge Porter appeared before the Senate Judiciary Committee in September for his confirmation hearings, but the Congress adjourned before acting upon the nomination. Instead of being resubmitted during the new 99th Congress, Judge Porter's nomination was derailed because the ABA Committee had changed its mind in the interim, and had re-evaluated him as "not qualified." *See Knoxville News-Sentinel*, July 31, 1987, at 1, col. 1

Attorney General rather than the "President's federal judicial selection committee" that actually recommends the particular candidate to the President. The record does not indicate whether the President has ever rejected the Attorney General's recommendation.

3. Legal Proceedings

On December 11, 1985, appellant Washington Legal Foundation originally filed suit only against the ABA Committee, its members, and the ABA, seeking declaratory and injunctive relief that FACA applies to the Committee's advisory role with the Department of Justice in the screening and selection of judicial candidates suitable for consideration by the President. *See Washington Legal Foundation v. American Bar Ass'n Standing Comm. on Federal Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (*"WLF I"*). That suit was instituted after the Committee had expressly refused to comply with WLF's repeated requests for information that the Committee had shared with certain liberal activist groups, and had also rejected WLF's request for information about its meetings, stating that it did not consider FACA to apply to any of its activities. *See* Exhibits A-D to WLF's Complaint (J.A.13-19).[9]

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[9] While *WLF I* is not before the Court in this appeal, a brief description of it will help place the instant case in proper perspective, especially since the court below bootstrapped the alleged "findings" from *WLF I* into its decision in the case at bar.

Shortly after filing its complaint in *WLF I*, WLF attempted to conduct discovery. However, the district court, over WLF's opposition, ruled on February 5, 1986, that discovery was "premature," apparently because of representations that the ABA defendants would file a dispositive motion. The ABA Committee subsequently filed an Answer and motions to dismiss, arguing, *inter alia*, that WLF lacked standing, that FACA does not apply to the ABA Committee, and that if FACA did apply, it would violate the separation of powers by interfering with the President's nominating power under Article II, as well as violate the ABA Committee's first amendment rights.

On April 8, 1986, WLF filed an opposition to the motion to dismiss, and shortly thereafter attempted to add the Department of Justice as a defendant to the case. Because the Court inexplicably denied WLF's motion to add the DOJ as a defendant, and because the United States declined the Court's

WLF filed the instant action (*"WLF II "*) directly against the Department of Justice on October 11, 1986 seeking declaratory and injunctive relief under FACA and the Administrative Procedures Act, 5 U.S.C. 706 (J.A.11) In *WLF II*, the Department of Justice filed a motion to dismiss WLF's complaint on January 2, 1987, accompanied with a Declaration by Steve A. Matthews, Deputy Assistant Attorney General, Office of Legal Policy. That motion raised essentially the same arguments as did the ABA Committee's motion to dismiss in *WLF I*, that is, that the ABA Committee is not an advisory committee, and that if FACA were to apply, the separation of powers would be violated. DOJ's motion, however, did not raise the issues of standing or the First Amendment.

On February 4, 1987, WLF filed its opposition to the motion to dismiss. On the same day, appellee Public Citizen moved to intervene as a party plaintiff or in the alternative as an *amicus curiae*, and filed a proposed complaint and motion for summary judgment. On March 11, 1987, the district court granted Public Citizen's motion to intervene and permitted its complaint and motion for summary judgment to be filed.

On March 25, 1987, DOJ filed a memorandum that served both as a reply to WLF's opposition to DOJ's motion to dismiss, and as an opposition to Public Citizen's motion for summary judgment. DOJ also filed a Statement of Material Facts. Since DOJ never filed a formal motion for summary judgment, it was unclear

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invitation to intervene in the case, WLF filed the instant action on October 21, 1986, against the Justice Department. *Washington Legal Foundation v. U.S. Department of Justice*, No. 86-2883 (D.D.C.) (*WLF II*).

Finally, on November 26, 1986, the district court granted the ABA Committee's motion to dismiss in *WLF I*, ruling that while our allegations of injury were sufficient to confer standing, a suit under FACA lies only against the agency utilizing the committee, *i.e.*, the Justice Department. 648 F. Supp. 1353 (D.D.C. 1986). WLF appealed that dismissal to the United States Court of Appeals for the District of Columbia Circuit, which has held the case in abeyance pending resolution of the instant case. *WLF v. ABA Standing Comm.*, No. 87-7022 (D.C.Cir.). Public Citizen did not intervene in that action.

whether the court would treat DOJ's motion to dismiss as one for summary judgment.

Accordingly, on April 30, 1987, appellant WLF filed a conditional response to DOJ's Statement of Material Facts and an Affidavit under F.R.Civ.Pro. 56(f), indicating that it needed discovery in order to respond to and oppose some of the assertions made in DOJ's Statement of Material Facts, which information was exclusively in DOJ's hands. (J.A.54) The court also signed an order on April 30 setting the case down for oral argument on "cross-motions for summary judgment," thereby indicating for the first time its intention to treat DOJ's motion to dismiss as a motion for summary judgment. On May 12, WLF filed an "alternative" motion for summary judgment for the court to consider if it were inclined to grant Public Citizen's motion for summary judgment. Yet by having filed a Rule 56(f) Affidavit, WLF still maintained that summary judgment was improper at this stage for DOJ.

Oral argument was held on May 26, 1987, and the court took the matter under advisement for over 14 months. On August 4, 1988, the court finally issued its opinion, holding that the ABA Committee is an advisory committee under the Act, but held that the application of any of FACA's provisions would violate the separation of powers doctrine by potentially interfering with the power of the President under Article II to nominate federal judges (App. 26a-27a). The court held that the "role of Congress is limited to the Senate's advice and consent function" and that the "purposes of FACA are served through the public confirmation process" (App. 27a). The court concluded by stating that "any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality" with respect to judicial nominees, *id.*, but it reached this conclusion, (a) without clarifying precisely what information must be kept confidential; (b) without citing any record evidence from DOJ that application of FACA to the ABA Committee would in fact interfere with the nominating process; and (c) without considering provisions of FACA that do not raise confidentiality concerns, or indeed, that make express accommodations for them.

On August 25, 1988 the American Bar Association intervened for purposes of this appeal and filed an Answer to WLF's and Public Citizen's Complaints (J.A.62, 69).

SUMMARY OF THE ARGUMENT

The district court properly held that the ABA Committee constitutes an advisory committee under the Federal Advisory Committee Act because it is utilized by the Department of Justice to screen judicial candidates to the federal bench, and to advise the Department of the candidates' qualifications. To hold otherwise would simply violate the plain meaning of the words of the statute, frustrate the intent of the Congress that enacted the law, be inconsistent with the implementing regulations promulgated by the General Services Administration, conflict with past practice of the Executive branch, and be contrary to the controlling weight of case law. The court could not legitimately and fairly construe FACA's broad remedial language in such a way as to exempt the ABA Commmittee in order to avoid addressing the separation of powers argument raised by the government.

The court, however, seriously erred in ruling that none of FACA's provisions, whose implementation are entrusted to the Executive branch, can be applied in this case because FACA's potential for interfering with the President's power under Article II to appoint federal judges is so great that it amounts to an unconstitutional breach of the separation of powers. The court was wrong to have reached this sweeping conclusion without any record evidence from the government that the application of FACA would be disruptive of the exercise of the President's nominating power, and without examining the provisions of FACA that would appear to accomodate the exaggerated and unfounded fears of FACA's alleged intrusiveness in the Presidential decision-making process. FACA is simply a procedural statute that regulates the manner in which the Executive branch utilizes private advisory groups in order to ensure the integrity and accountability of the governmental decision-making process. FACA does not usurp any substantive power that the President has under the Appointments Clause.

FACA's application to the ABA Committee would not violate its First Amendment rights as it claims since the Committee has voluntarily agreed to perform a public or quasi-public function that if anything, makes the ABA Committee liable as a "state actor" for its conduct. The lower court also improperly granted summary judgment for the defendant without allowing appellant to take discovery to rebut the claims of the Justice Department and to place the case in a firm factual setting for proper resolution of the constitutional issues.

ARGUMENT

I. THE LOWER COURT CORRECTLY FOUND THAT THE ABA COMMITTEE "FITS SQUARELY" WITHIN THE DEFINITION OF "ADVISORY COMMITTEE" UNDER FACA AND GSA REGULATIONS.

While as a general rule, a court should avoid reaching a constitutional issue by ascertaining "whether a construction of the statute is fairly possible by which the question may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), FACA simply could not be fairly construed in such a way as to exempt the ABA Committee completely from its coverage. *See United States v. Locke*, 471 U.S. 84, 96 (1985); *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986).

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania,*

Inc., 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richard v. United States*, 369 U.S. 1, 9 (1962)). *See also INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213, n.12 (1987) (Court looks to message conveyed by "the plain language of [the] statute" and looks at the "legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language"). In addition, in considering statutes which have broad remedial purposes, such as FACA, a court must take care not to narrow the coverage. *See Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).[10]

Applying these basic principles of statutory construction to the statute and facts in the case at bar leads to the inescapable conclusion that the ABA Committee is an advisory committee under FACA.

A. The Statutory Language

Section 3 of FACA broadly defines the term "advisory committee" as "any committee, board, commission, ... task force, or other similar group, or any subcommittee or other subgroup thereof ... which is ...

> (B) established or *utilized* by the President,
>
> or
>
> (C) established or *utilized* by one or more agencies, in the interest of obtaining *advice or*

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[10] In *Sedima*, the lower courts had held that a "narrow construction of the statute was essential to avoid intolerable practical consequences," and that a broad construction "would raise severe constitutional questions...." 473 U.S. at 491-92. This Court reversed, noting the broad remedial purposes of the statute in question, and concluding that "[w]e do not view the statute as being so close to the constitutional edge," *id.* at 492, and that "[e]ven were the constitutional questions more significant, any doubts would be insufficient to overcome the mandate of the statute's language and history." *Id.* at 492, n.11.

> *recommendations* for the President *or* one or more agencies *or* officers of the Federal Government...."

Id. § 3(2)(emphasis added). The ABA Committee would thus constitute an advisory committee under FACA if it is a "committee" "utilized" by DOJ for "advice or recommendations."

In the first place, the ABA Committee is obviously a "committee," in that it is both denominated and structured as such (J.A.43). It is just as obvious that the Committee satisfies the other statutory criteria. As the lower court correctly found:

> Interpreting the term "utilization" is not as complicated a task as defendant suggests. The common-sense meaning of "utilized" is "to make use of." *Webster's Third New International Dictionary* (1963). The facts [of this case] easily support the conclusion that DOJ "makes use of" the ABA Committee by directly and preferentially soliciting its assistance and *recommendation* on judicial nominees.

App. 8a (emphasis added).

There can be no doubt that the ABA's evaluation of a candidate's fitness to be a federal judge constitutes "advice or recommendations" to the Justice Department. The word "recommend" means "to make a commendatory statement about as being fit or worthy (as for a job)." *Webster's Third New International Dictionary* 1897 (1976). The ABA Committee's evaluation and rating of a judicial candidate clearly constitute a statement about the fitness of the candidate to be a federal judge.[11]

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[11] A candidate rated by the ABA as "qualified," for example, is considered by the ABA to be fit "to perform satisfactorily as a federal judge." *See ABA Brochure* at 5. (J.A.46). A candidate rated "well qualified" is worthy of the "Committee's strong *affirmative endorsement*...." *Id.* (emphasis added). Those candidates found to be "not qualified" are considered unfit for the job

But even if the ABA Committee's evaluation did not constitute a "recommendation" to DOJ, FACA's operative language would still apply, since it is couched in the disjunctive ("advice *or* recommendations"). Both the Justice Department and the ABA readily use the term "advice" in describing their relationship with each other. *See e.g.,* Matthews Dec., ¶ 4 (J.A.21) (the ABA Committee is a "source[] of... advice" for DOJ); ABA Answer, ¶ 8 (J.A.64) (ABA Committee "advises the Department of Justice of [the ABA's] investigations and evaluations" of judicial candidates).[12]

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from the ABA's viewpoint. *Id.*

[12] In *WLF I*, the ABA steadfastly denied that the ABA Committee is an advisory committee under FACA, but suggested that it would be such if it supported or opposed a prospective judicial nominee, rather than simply evaluated him. *See* ABA's Motion to Dismiss at 39; ABA Answer ¶ 4 filed in *WLF I*. The ABA reaffirms this position here. *See* ABA Memorandum in response to the Jurisdictional Statements ("ABA Mem.") at 17. While such a distinction is not determinative of the ABA Committee's status under FACA, WLF nevertheless made this very allegation in its Complaint in the case at bar:

> 14. The ABA Committee has opposed or supported and continues to oppose or support judicial candidates for nomination and appointment as authorized by the ABA By-Laws and other governing documents. (J.A. 8).

Since DOJ never filed an Answer in this case, it never denied the allegation. The ABA, when now presented with the clear and ample opportunity to admit or deny this averment in its Answer, responds equivocally in violation of the pleading requirements of Fed.R.Civ. Pro. 8(b) and 8(d):

> 14. The ABA admits that it is involved in the process of investigating and evaluating the qualifications of candidates for the federal judiciary. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied. (J.A.66).

There is nothing "inconsistent" with opposing a prospective judicial nominee which one finds "unqualified," or supporting a candidate which one finds to be "well qualified." On the contrary, the two functions are entirely consistent. Accordingly, WLF's allegation on this point must be taken as admitted. *See Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030 (CCPA 1982)("An answer which attempts to evade the pleading requirements of Rule 8 by the tactic of an equivocal admission or denial is an admission"). *See also ABA Brochure* 7 (J.A.49) (ABA Committee "will oppose the nomination [of unqualified nominees] in such ways as may be appropriate under the circumstances"); ABA Constitution and By-Laws, Article 30 (ABA Committee may "promote" or "oppose" the "nomination and confirmation of...persons for appointment as judges of the courts of the United States"). Thus, even under the ABA's own criteria, its Committee is an

The courts have consistently construed the definition of "advisory committee" broadly as intended by the Congress. In *Food Chemical News, Inc. v. Davis*, 378 F.Supp. 1048 (D.D.C. 1974), the court ruled that two separate "informal" meetings by agency officials with consumer representatives and members of the distilled spirits industry regarding proposed agency regulations were meetings of "advisory committees" utilized by the agency to obtain advice within the meaning of FACA. In *National Nutritional Foods Association v. Califano*, 603 F.2d 327 (2d Cir. 1979), the Second Circuit held that a group of five physicians who had been in town for a conference and had met with FDA officials only once to advise them on proposed regulations constituted a federal advisory committee. The court concluded that the group, like the group of industry representatives in *Food Chemical News*, was relied upon by government officials and that FACA therefore applied. The court added that "[i]f the straitjacket [of FACA] is too tight, Congress is free to loosen it." 603 F.2d at 336. *See also Center for Auto Safety v. Tiemann*, 414 F. Supp. 215 (D.D.C. 1976), *aff'd in part on other grounds sub nom., Center for Auto Safety v. Cox*, 580 F.2d 689, 693 (D.C. Cir. 1978)("plain meaning" of FACA applies to agency's use of independent, pre-existing organization established in 1914; any statutory exemptions from FACA "should be construed narrowly"). If an informal, *ad hoc* group such as that described in *National Nutritional Foods* is considered an "advisory committee" under FACA, the ABA Committee's long-standing advisory role with DOJ is certainly covered as well.

B. GSA Regulations

The General Services Administration (GSA) has promulgated regulations describing the kinds of circumstances and committees that would and would not

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advisory committee under FACA.

be covered by FACA. *See* 41 C.F.R. Subpart 101-6.10. Not surprisingly, the DOJ, in the court below, did not even refer to these regulations, let alone argue that they could be construed to exempt the ABA Committee from FACA coverage. Nevertheless, because the court below examined the GSA regulations and because the ABA is likely to raise the GSA regulations as a defense in this Court, *see* ABA Answer, First Affirmative Defense (J.A.62), appellant will briefly address these regulations.

The GSA definition of "advisory committee" fairly tracks the broadly worded FACA definition, stating in pertinent part that an advisory committee is any committee "established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities." 41 C.F.R. 101-6.1003. The word "utilized" is also broadly defined as the use of a committee or group

> composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the Federal Government which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

Id. As the lower court correctly concluded, the ABA Committee "fits squarely within this definition. The Committee's historically lengthy, direct, and significant relationship with DOJ in the evaluation process has clearly made it a preferred source of advice in the nomination process" (App. 9a).There can also be no doubt that the ABA provides its "advice or recommendations" on "issues or policies." 41 C.F.R.

101-6.1003. Clearly, whether a candidate is fit to be a judge is an "issue" before the DOJ, and the selection of competent candidates who share the President's judicial philosophy is a "policy" within DOJ's scope of responsibility. It is no accident that the responsibility of screening judicial candidates has been placed in the Office of Legal *Policy*. 28 C.F.R. 0.23(d).

In short, under both FACA and GSA regulations, the ABA Committee possesses all the indicia of an advisory committee and no indicia that would warrant exempting it from that designation. *See App.* 13a, n.34; 41 C.F.R. 101-6.1004.

C. The Legislative History

Since the common-sense meaning of the definition of "advisory committee" in FACA and the GSA regulations clearly encompasses the ABA Committee, there is no need to resort to the statute's legislative history to determine the statute's meaning. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)(if "intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

In any event, neither the DOJ nor the ABA has ever argued that such history contains any *"clearly expressed* legislative intent to the *contrary."* *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added). Rather, appellees improperly turn the legislative history inquiry on its head. They claim that FACA should not apply to the ABA because, in their view, there is no clearly expressed legislative intent in the *affirmative* that Congress wanted FACA to cover a group such as the ABA Committee which (1) is "not established or funded in any manner by the federal government," (2) is "not a narrow special interest group out to promote its particular viewpoint" but is "broadly based," (3) gives advice on personnel evaluations, and (4) advises the President on "matters exclusively committed to the President under the Constitution." DOJ Motion to Dismiss at 18; ABA Mem. 10, 19, 20. All of these contentions are meritless. Indeed, an examination of the legislative history clearly *supports* rather than contradicts the lower court's conclusion that the ABA Committee is an advisory committee under FACA.

1. The fact that the ABA Committee may not be "established or funded" by the federal government is not a sufficient reason for excluding the ABA Committee from FACA's coverage. The express terms of FACA apply to "*any* committee" "established *or utilized*" by the government, regardless of funding. FACA, § 3(2)(C). Furthermore, the Senate Report, in explaining its version of the bill, stated:

> The intention is to interpret the words "established" and "organized" in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and *whether or not Federal money is expended*, to obtain advice and information, such group is covered by the provisions of this bill.

S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). (emphasis added). The final version of the bill included FACA coverage to committees either "established" or "*utilized*" by the government.

2. Nothing in the language of FACA or the GSA regulations indicates any exemption for committees that are, or claim to be, broadly based. The fact that the undue influence of government officials by special interests may have been the primary motivating force behind FACA's passage is no reason to read the statute narrowly. On the contrary, a broad reading of FACA furthers that purpose. By applying the disclosure and other provisions of FACA, the Congress intended the law

to have a prophylactic effect so as to ensure the integrity of agency decision-making. In addition, past agency practice of DOJ and past Presidents demonstrates that the Executive branch views FACA as applicable even to advisory committees which do not represent special interests.[13] This past practice is evidence of the Executive branch's "gloss" on the statute that comports more with WLF's position than appellees.

In any event, the ABA is widely considered to be a special interest or trade group, which lobbies for its point of view before the Congress, the agencies, and courts of law. The ABA's members are lawyers who not only litigate cases for their private clients but are themselves subject as attorneys to sanctions by the courts, F.R.Civ.Pro. 11, or to awards of attorneys' fees under 42 U.S.C. 1988. The ABA and the ABA Committee may very well have a negative view of judicial candidates who they think will be strict in enforcing sanctions, or conservative in awarding attorneys' fees. It is extremely naive to suggest that the ABA and its members have no institutional or personal stake in the outcome of the makeup of the federal judiciary. Aside from these obvious special interests, there may also be less obvious ones, such as those proffered by WLF in the court below that give rise to a conflict of interest between the ABA Committee and the candidate under review.[14]

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[13] *See, e.g.*, Attorney General's Commission on Pornography, 50 Fed. Reg. 8684 (1985); President's Special Review Board ("Tower Commission") established under FACA to study and make recommendations concerning the role of the National Security Council in wake of Iran/Contra matter. Exec. Order 12,575, 51 Fed. Reg. 43718 (1986); United States Circuit Judge Nominating Commission, Exec. Order 12,059, 43 Fed. Reg. 20949 (1978); Presidential Advisory Board on Ambassadorial Appointments, Exec. Order 11,970, 42 Fed. Reg. 7919 (1977). The functions performed by these last two presidential advisory committees are essentially the same, if not identical, to the function performed by the ABA Committee in the instant case.

[14] For example, the ABA Committee was called upon in 1985 by DOJ to investigate William F. Harvey, former dean of and current professor at Indiana University School of Law at Indianapolis, for a position on the Seventh Circuit. From 1981-82, Professor Harvey had been President Reagan's

3. The legislative history of FACA clearly demonstrates that Congress did not intend to exempt personnel matters from the purview of the Act. The Senate Report considered and dismissed concerns about public participation in advisory committee meetings, concerns which had been expressed by those agencies whose advisory committees:

> dealt with such issues as national defense and foreign policy, trade secrets, matters relating to the regulation and supervision of financial institutions and markets, and information concerning the *competence and character of individuals*, such as that taken up by the grant review committees of the National Institutes of Health, the National Science Foundation and NASA.

S.Rep. No. 1098, 92d Cong., 2d Sess. (1972), *reprinted in Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 166 (emphasis added).

There are scores of advisory committees successfully operating under FACA's coverage that advise the National Institutes of Health, National Endowment of the Arts, and other agencies on matters dealing with "peer review," grant applications, or personnel. *See, e.g.*, U.S. Dep't of Health and Human Services, *NIH Advisory Committees* (1988). As previously noted, advisory

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Chairman of the Board of the Legal Services Corporation, an agency of special interest to the ABA. During that time, he and his Board had cut wasteful LSC expenditures and special grants. One of those LSC grant recipients was the ABA which had received $485,000 from the LSC under Professor Harvey's predecessor. Not only was the ABA highly critical of Professor Harvey's stewardship at LSC because of his "defunding" policy, the ABA Committee member responsible for investigating Professor Harvey's judicial qualifications in 1985 was also the same person in charge of the ABA's "Fund for Public Education," the actual recipient of past LSC largesse. Needless to say, the ABA Committee's conflict of interest was both real and apparent causing Professor Harvey's nomination to be derailed before it could even reach the President's desk.

committees screening judicial and ambassadorial candidates had been established under FACA to perform nearly identical screening functions as that performed by the ABA Committee. Over the years, FACA has been amended by the Congress, and regulations were promulgated by GSA. Yet no one has ever suggested to the Congress or to GSA that FACA *not* apply to such personnel matters. If there were any such suggestions, they were obviously ignored.

4. Nor is there any merit to the argument that Congress intended to exempt groups from FACA which advise the President on the exercise of his powers. When Congress intended to exempt certain governmental entities or functions from the reach of FACA or FOIA, it did so in clear and unmistakable language. *See* FACA, § 4(b)(1) (FACA "should not be construed" to apply to the Central Intelligence Agency or Federal Reserve System). Surely, by expressly including advisory committees that advise the President under FACA's coverage, the Congress intended to cover committees that advise the President on the exercise of both his exclusive and shared powers. DOJ's and ABA's (ABA Mem. 18-19) reliance on *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) *vacated as moot*, No. 75-1969 (D.C.Cir Jan. 10, 1977) and *National Anti-Hunger Coalition v. Executive Committee*, 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C.Cir. 1983) for a contrary proposition is misplaced.

In *Nader v. Baroody*, the plaintiff sought to bring within FACA's coverage biweekly multi-issue meetings between Executive branch officials and such diverse business and private sector groups as women's groups, church groups and senior citizens. 396 F. Supp. at 1232. The court noted that "the Act was not intended to apply to all amorphous, *ad hoc* group meetings." *Id.* at 1233. The circumstances in *Baroody* are clearly distinguishable from those in the instant case. In addition, there is no evidence, nor did the lower court in the instant case find any, that if FACA were to apply to the ABA Committee, there would be an intrusion on "the day-to-day functioning of the presidency" as was feared by the court in *Baroody*. A holding in the plaintiff's favor in *Baroody* would have otherwise called into question the applicability of FACA to any meeting by the President with two or more people. Such a possibility is of no concern here, of course, since the facts show that ABA Committee never meets with the President, but instead deals with DOJ officials.

Unable to point to any pertinent legislative history of FACA supporting their narrow construction of FACA or any authoritative case law, the appellees attempt to divine the intent of the Congress which enacted FACA in 1972, by looking at the legislative history of an entirely different law passed by an entirely different Congress six years later. *See* ABA Mem. 19-20. The Omnibus Judgeships Act of 1978, P.L. 95-486, 92 Stat. 1629 (1978) -- which created new judgeships on the condition that the President establish merit selection criteria, but indicated that he need not follow them -- has absolutely nothing to do with discerning the intent of the Congress which enacted FACA in 1972.[15] Not surprisingly, neither the ABA nor DOJ cite any authority for the novel canon of statutory construction that the intent of a later Congress can be imputed to a prior Congress with respect to different pieces of legislation.

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[15] In response to this legislation, President Carter issued Executive Order 12,097 establishing standards for evaluating proposed judicial nominees and requesting the Attorney General to assist the President in recommending nominees. 43 Fed. Reg. 52455 (1978). That order remained extant throughout most of the Reagan Administration until it was revoked by Executive Order 12,553, 51 Fed. Reg. 7237 (1986). Appellant is unable to locate any current order or directive which requests the Attorney General to assist the President in the exercise of his judicial appointment powers, as there is, for example, an order authorizing the Attorney General to assist the President in exercising his pardon power, which is an exclusive rather than shared power of the President. *See* 28 C.F.R. Part 1; 48 Fed. Reg. 22290 (May 18, 1983) (Attorney General Order No. 1011-83 signed and approved by President Reagan). The absence of such a directive brings into question the suggestion by DOJ that the President "deems necessary" that the Attorney General use the ABA Committee. *See* Def. Statement of Material Facts ¶ 1 (J.A.34); Plaintiff's Rule 56(f) Affidavit, ¶ 2 (J.A.53).

Furthermore, the defendant's reliance on legislative acquiescence in the face of the Executive's *de facto* exemption of the ABA from FACA coverage is hardly evidence of legislative intent. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, n.13 (1985) ("congressional silence, no matter how 'clanging,' cannot override words of the statute"); *United States v. Locke*, 471 U.S. 84, 95 (1985). *See also* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515 (1982) ("legislative inaction--whatever intent it might signal--is *a fortiori* a forbidden source of law").

It is evident that no construction of FACA is "fairly possible" that would exempt the ABA Committee from FACA's coverage without doing severe violence to the intent of Congress. We now turn to the separation of powers objections raised by the court below.

II. THE APPLICATION OF FACA TO THE ABA COMMITTEE WOULD NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

In determining whether an Act of Congress violates the separation of powers, this Court has adopted a "functional analysis" approach to the issue as suggested by James Madison in Federalist No. 47, rather than a formalistic approach which views the three branches of government as entirely separate and compartmentalized. In the leading case of *Nixon v. Administrator, General Services*, 433 U.S. 425 (1977), this Court rejected a separation of powers challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note, empowering the General Services Administration with authority to control the disposition of presidential records. In so doing, the Court formulated the separation of powers test as follows:

> Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342. Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on *the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions*. *United States v. Nixon*, 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives *within the constitutional authority of Congress*. *Ibid.*

433 U.S. at 443 (emphasis added) (footnote omitted). *Accord Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). This functional analysis test has been employed repeatedly by this Court, as it was in *Morrison v. Olson*, 108 S.Ct. 2597 (1988) (holding that the independent counsel statute did not violate separation of powers), and most recently in *Mistretta v. United States*, 57 U.S.L.W. 4102 (January 18,1989) (upholding constitutionality of statute placing U.S. Sentencing Commission within judicial branch and having judges serve on the Commission). If this Court found no violation of the separation of powers in *Morrison* and *Mistretta*, where substantive powers of the Executive and Judicial branches were diminished by the statutes involved in those cases, surely there can be no violation of the separation of powers in this situation where FACA does not usurp any substantive power of the Executive branch at all, but merely constitutes a procedural statute governing the use of private advisory committees.

While the district court correctly noted that the *Nixon v. GSA* test was the proper one to consider (App. 16a, n.37), the lower court seriously misapplied it. The court struck down FACA as applied to the ABA Committee on separation of powers grounds

> because of the express provision of Article II, sec. 2, cl. 2 of the Constitution that the President alone shall

> nominate candidates for federal judgeships. The role of Congress is limited to the Senate's advice and consent function. Furthermore,...the purposes of FACA are served through the public confirmation process and any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees.

(App. 27a). The threat that FACA poses to the President's nominating power was clearly more imagined than real. The lower court's initial error was prematurely ruling that FACA cannot be constitutionally applied without letting any of its provisions be applied by the Executive in a factual setting.[16]

The lower court not only prematurely and unnecessarily resolved the separation of powers issue, it did so incorrectly. The district court grossly overestimated the intrusion that FACA would have on the President's appointment power, and seriously underestimated the legitimate authority Congress has over this area.

Accordingly, WLF will first briefly examine the history of the Appointments Clause of Article II as well as discuss the additional Constitutional powers Congress enjoys in this area, none of which were discussed below. All of these powers, either singly or together, provide compelling support for Congress' interest in the judicial nominating process. WLF will then apply the functional test to show that FACA does not intrude on the

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[16] *See Pennell v. City of San Jose*, 108 S.Ct. 849, 856 (1988) ("premature" to consider "constitutionality of statutes...except in an actual factual setting that makes such a decision necessary"). For example, the chartering provision of FACA would certainly not implicate the separation of powers or confidentiality concerns. Yet, the ABA Committee may even find DOJ's attempt to simply charter it as an advisory committee objectionable and decide instead to discontinue providing its advice to the Justice Department. In such a case, there would be no need to address the applicability *vel non* of the remaining FACA provisions.

President's nominating power and falls far short of threatening any violation of the separation of powers.

A. The Congress Possesses Numerous Powers Under The Constitution To Regulate In This Area Which Were Improperly Ignored By The Court Below.

1. The Senate's "Advice and Consent" Power Under The Appointments Clause.

The constitutional history of the Appointments Clause with respect to the judiciary indicates that initially, there was no role whatsoever contemplated for the President. The debate centered around whether to place the entire appointment power in the full Congress or lodge it in the Senate. Thus, Charles Pinkney and Roger Sherman originally proposed on June 13, 1787, that there should be "one supreme tribunal, the Judges of which to be appointed by the national Legislature." J. Madison, *Notes of Debates in the Federal Convention of 1787*, 112 (1976) ("*Madison's Notes*"). James Madison objected to the proposal, and offered a motion instead that appointment be in the Senate, "which as a less numerous & more select body, would be more competent" to assess the qualifications of judges. Madison's motion was agreed to. *Id.* at 113.[17]

Alexander Hamilton, who favored a strong Executive, subsequently proposed on June 18 that the Executive was "to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the *approbation or rejection* of the Senate...." *Id.* at 138

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[17] The only role for private lawyers in the appointment process that was mentioned during the debates was the one suggested in jest by Benjamin Franklin who recounted "a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves." *Id.* at 68.

(emphasis added). Hamilton's proposal made no express provision for the Supreme Court, in contrast to all the other proposals, since his focus was on strengthening the President's power with respect to the appointment of those who would serve the President in the Executive branch rather than in the independent Judiciary.

In any event, the debate over where to place the appointment power with respect to the Supreme Court continued. Motions by Nathaniel Gorham and later by Madison to have the Executive participate with the Senate in this power failed on July 18 and 21. *Id.* at 317, 346. Thus, the June 13 resolution for placing the appointment of "Judges of the supreme Court" solely with the Senate was retained.

The matter lay dormant for several weeks and did not come up again until the closing days of the convention in September when the Special Committee on Postponed Matters issued a report covering Judges of the Supreme Court as well as certain executive officers, and placing the appointment power in the Executive with the advice and consent of the Senate. With little debate, this compromise measure was adopted. *Id.* at 599.

The history of the appointment power thus demonstrates that the Senate was always considered to have a significant role to play in the process. It also shows the Framers' separate consideration of the appointment power as it relates to the Judiciary as opposed to the Executive branch.

In addition to quoting Hamilton's *Federalist* 76, the court below also relied on John Adams who is quoted as saying that the President "ought to select the [candidates] best qualified and most meritorious for offices . . . without being shackled by any check by law, constitution or institution. Without this unrestrained liberty, he is not a check upon the legislative power nor either branch of it." IX *Works of John Adams* 634 (1854 ed.)(App. 17a,

n.38).[18] It is significant that during the Adams Administration, Congress demonstrated a more active "advice and consent" role in the selection process for judicial nominees than the lower court mistakenly suggests our Founding Fathers to have understood.

Following the enactment of the Judiciary Act of 1801, which created certain circuit judgeships, members of the Congressional delegations from New York, Vermont, and Connecticut met and agreed on recommending three names to the President. Adams had considered selecting Oliver Wolcott, his ex-Secretary of the Treasury, and approached the Senator from Connecticut to determine if he would be acceptable to the Connecticut delegation. The Connecticut delegation, after some internal debate on whether to support another candidate, finally agreed to Wolcott. As one commentator observed:

> This incident is significant in that it shows (1) that the Connecticut, Vermont, and New York delegations took the initiative in suggesting names for judgeships; (2) that Adams acted on his own initiative in suggesting Wolcott, but before nominating him consulted the congressional delegation from his State; (3)that the Connecticut delegation took it for granted that Wolcott would not be confirmed without its approval, but at the same time admitted that in theory, at least, the President was not bound to follow its recommendation, and (4) that although a Senator was the spokesman for the

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[18] This is not a surprising position taken by John Adams, for occasionally President Adams left himself open to criticism for some of his appointments. As one commentator noted:

> [Adams'] repeated efforts to appoint his vain and ambitious son-in-law, Col. William S. Smith, to high military office, led on one occasion to a sharp rebuff by the Senate, where ... Smith mustered only two votes. Adams, although his own opinion of Smith was not high, felt the "disgrace" keenly.

Swanstrom, *The United States Senate 1787-1801*, Sen. Doc. 99-19, 99th Cong., 1st Sess. 109 (1985) (footnote omitted).

> delegation, each member, Senator and Representative alike, had a *voice in the deliberations on appointments*--in other words, "congressional courtesy" was the rule rather than "senatorial courtesy."

Swanstrom, *supra,* at 111 (emphasis added). Since that time, "senatorial courtesy" has become the established practice, particularly with respect to district court nominees, whose judicial posts are located within the Senator's particular state and whose rulings affect interests in those states.[19]

In determining the intent of the Framers with respect to the "advice and consent" role of the Senate, the historical practice is relevant. *See Marsh v. Chambers,* 463 U.S. 783, 790 (1983). Thus, the Senate's "advice and consent" role was in practice, no less than in theory, not a merely passive one, but an active one on which the Executive heavily and consistently relied, and which the Senate expected to exercise.

2. Congress' Power Under Article III To Establish And Regulate "Inferior Courts."

Article III provides that the judicial power is vested in the Supreme Court" and in such *inferior* Courts as the Congress may from time to time ordain and establish." (Emphasis added). Thus, all district courts and courts of appeals are created and established by the Congress (28 U.S.C. 43, 133), and presumably, Congress can abolish any or all of them. *See Crenshaw v. United States,* 134 U.S. 99 (1890). *See also* Art. I § 8, cl. 9 (power to "[c]onstitute Tribunals inferior to the supreme Court).

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[19] See Grossman, *supra,* at 30-39; 42. Thus, while Presidents have traditionally considered Supreme Court nominees to be their personal prerogative, district court nominees have been regarded as the prerogative of the senators of the same party of the President, while nominations to the courts of appeals "appear to 'go either way,' depending on the case at hand." *Id.* at 27.

Pursuant to these powers, Congress has extensively regulated the conduct of judges, the exercise of their authority, and has even mandated certain qualifications.[20] The President, on the other hand, has no powers *whatsoever* with respect to the conduct and the operation of the judiciary or individual judges. His lack of authority in this regard stands in marked contrast to the power he enjoys over appointees in the Executive Branch who are subject to the President's control, direction, and removal.

3. Congress' Power Under Article II Regarding "Inferior Officers."

The lower court held that FACA "cannot be constitutionally applied to the [ABA] Committee because of the express provision of Article II, § 2, cl. 2 of the Constitution that the President alone shall nominate candidates for federal judgeships" (App. 27a). Article II, however, is not expressed in so absolute terms. Article II gives the President the exclusive power to nominate "Judges of the supreme Court" and "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." But Article II also vests the Congress with the power to place the appointment of "inferior officers" in the "President alone, Courts of law, or Heads of Departments." Since the lower courts are referred to as "inferior" courts which may be created by the Congress under Art. III, lower court judges could also be considered "inferior Officers" in an Article II sense.

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[20] Congress sets residency requirements for appointees to the lower courts (28 U.S.C. 44(c); 134(b)); defines and limits the court's subject matter and territorial jurisdiction (28 U.S.C. 1331); enacts rules of evidence (28 U.S.C. 1731), mandates a judge's recusal in appropriate cases (28 U.S.C 455); provides for disciplinary measures to be taken against judges (28 U.S.C. 372(c)); and can ultimately remove judges from office (Art. II, sec. 4).

If that is true, then the Congress could, under Article II, vest the appointment of such "inferior" judges "in the President alone, in the Courts of Law, or in the Heads of Departments." Congress has mandated that the method of lower court appointments shall be by the "President...by and with the advice and consent of the Senate..."28 U.S.C. 43, 44(a). Since certain interbranch appointments are constitutionally permissible, *see Morrison v. Olson*, 108 S.Ct. 2597 (1988), Congress could choose to vest the judicial appointment power in the Attorney General as "Head of [his] Department," where the power effectively is located and exercised anyway. Congress may also choose to vest the appointment of lower court judges in the Supreme Court or in the Chief Justice; such an intrabranch appointment would, *a fortiori*, pass constitutional muster. While there has been no litigation directly on this point,[21] one scholar concluded in an extensive three-part treatment on the subject, that lower court judges are "inferior officers" in an Article II sense and therefore, the Congress could divest the President of the appointment power of those judges and place it in the Chief Justice or in the Supreme Court. *See* Shartel, *Federal Judges: Appointment, Supervision, and Removal--Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485, 723, 870 (1930). Professor Shartel carefully examined the proceedings of the Constitutional Convention with respect to the appointment power and how the Framers focused only on judges of the Supreme Court in all of the drafts, whereas judges of lower courts were never referred to. He also examined the history of and practice under other provisions of the Constitution, such as Art III authorizing Congress to create "inferior courts," and Art. 1, sec. 8, cl. 9 authorizing Congress "to constitute Tribunals inferior to the supreme Court;" the acts and debates of

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[21] *See Clark v. United States*, 72 F.Supp. 594, 601 (Cl. Ct. 1947), *cert. denied*, 333 U.S. 833 (1948)(Congress cannot "vest...authority [to appoint circuit court judge] in itself [but] could vest it only 'in the President alone, in the Courts of Law, or in the Heads of Departments'") (dictum).

Congress; the wide discretion enjoyed by Congress in determining who is an "inferior officer;" the Executive practice; and the practice of courts and judges, including the supervisory role the Supreme Court has over lower court judges. Professor Shartel makes a compelling case that the "inclusion of federal judges among inferior officers is quite in harmony with the proceedings of the Constitutional Convention" and that the framers did not intend "to confer on the President and Senate as a joint agency, an irrefragable Constitutional hold on their appointment." *Id.* at 534. Obviously, if Congress has the power to divest the President of the power to appoint judges to "inferior courts," Congress' interest in ensuring the integrity of the current method of appointment could not be questioned. This Court need not reach this issue, unless it determines that all of the other powers of Congress in this area are insufficient to support the application of FACA to the judicial screening process.

4. *The Necessary and Proper Clause.*

In addition to the extensive powers that Congress enjoys over the judiciary under Articles II and III, Congress has power under the Necessary and Proper Clause of Article I to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" Art. I, sec. 8, cl. 18 (emphasis added). Thus, with respect to the instant case, Congress has a constitutional interest in the exercise of the nomination and appointment power of the President, and especially so since it is a power in which the Senate has an express role to play. Congress similarly has a constitutional interest in the functioning of the Department of Justice, an agency created by the Congress.

This Court first acknowledged the expansiveness of the power enjoyed by the Congress under the Necessary and Proper Clause in *McCulloch v. Maryland,* 17 U.S. (4

Wheat.) 316 (1819). With respect to the power of Congress to control agency documents and ensure the integrity of the operation of the federal government, this Court has similarly found within the Necessary and Proper Clause ample authority for Congressional legislative activity to make procedural rules in this area. [22]

FACA is a law designed to ensure integrity in the decision-making process of the government by regulating the manner in which government employees and officers rely upon private organizations to perform what is essentially government functions. In that respect, the Necessary and Proper Clause provides the Congress with additional authority to regulate in this area which was overlooked by the court below.

Accordingly, while appellant submits that the Senate's "advice and consent" power under Article II is more than sufficient to justify FACA's applicability to the nominating process, other related constitutional powers belonging to the Congress described, *supra*, further support its legislative interest in this area.

B. The President's Power of Appointment Is Not Implicated In This Case Since The ABA Committee Advises Only The Attorney General.

To the extent that FACA regulates the manner in which advice may be given to the Attorney General, no separation of powers concerns arise, since the Attorney

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[22] *See Boske v Comingore*, 177 U.S. 459, 468 (1900)(Necessary and Proper Clause gives Congress power to authorize promulgation of regulations of agency's "custody, use and preservation of records, papers, and property appertaining to it"); *Ex Parte Curtis*, 106 U.S. 371 (1882) (laws designed "to promote *efficiency and integrity in the discharge of official duties* . . . . [c]learly ... is within the just scope of legislative power") (emphasis added); *Burton v. United States*, 202 U.S. 345, 367 (1905) (upholding law designed to keep Executive officers from being subjected to undue influence in their decision-making process: "There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs").

General, whose office, department and duties are defined by the Congress rather than expressed in the Constitution, has no nomination or appointment power under the Constitution.[23] The Justice Department's assertion below that the Attorney General serves sometimes as an advisor to the President does not compel a different result.

In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the Department of Justice was sued under the Freedom of Information Act seeking documents provided to the Attorney General with regard to his assumed duties in evaluating judicial candidates. There, the court rejected the government's argument that the records were not agency records but were documents belonging to the Attorney General as "'counsel and advisor to the President' in furtherance of the President's power to nominate judges." *Id.* at 786. In language that is equally instructive in the instant FACA context, the *Ryan* court observed:

> Although the documents are for the ultimate benefit of the President in a nominating role that is exclusively his, we find that the Attorney General was acting as an independently controlling entity, and not a mere conduit. The questionnaires solicited responses from Senators *at the request of the Attorney General, not the President*. In his cover letter enclosed with the questionnaires, the Attorney General stated the independent role he was to play in this process: he was to consider certain factors before making *his own recommendations to the President* as to judicial nominees. This is an independent exercise of judgment that the Attorney General has traditionally taken in the judicial nomination

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[23] As a historical matter, until the Pierce Administration, the Secretary of State (rather than the Attorney General) screened federal judicial candidates, as well as other federal officers. Grossman, *supra*, at 25.

> process. The logical deduction from the facts is that the Attorney General was to control the questionnaire responses for the purpose of carrying out *his independent* duties.

617 F.2d at 786 (emphasis added).

In the instant case, it is the Attorney General (or more accurately, the Assistant Attorney General, Office of Legal Policy), not the President, who solicits and considers the ABA's advice and recommendations. He does so in order to make "his own recommendations to the President." Indeed, the Matthews Declaration repeats the relevant language from the *Ryan* case by stating, "The Attorney General considers the ABA evaluation in making *his own recommendations to the President* regarding potential nominees...." Matthews Declaration ¶ 4 (emphasis added). Accordingly, the constitutional implications of applying FACA in this case were greatly exaggerated by the government and the lower court.[24]

C. FACA Does Not Usurp Any Substantive Power of The President or Aggrandize Congressional Power.

Even assuming, *arguendo*, that the ABA does provide advice and recommendations directly to the President, the initial ~~separation~~ inquiry is focused on the "extent to which [FACA] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. GSA*, 433 U.S. at 443.

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[24] *See also In re Attorney General of the United States*, 596 F.2d 58, 62 (2d Cir. 1979) ("[E]xecutive responsibility and constitutional status of the Attorney General do not compare to those of the President. The Attorney General has no greater authority over his department's official records than does any other Cabinet officer. Since the earliest days of this nation, courts have declined to accord to Cabinet or other executive officials the same prerogatives that they accord to the President.").

1. *FACA Would Not Intrude On The President's "Core" Power To Nominate Judges.*

The application of the procedural requirements of FACA to the judicial nominating process clearly does not "prevent the Executive Branch from accomplishing its constitutionally assigned function." Significantly, there was no record evidence in this case submitted by the Department of Justice to the effect that application of FACA to the ABA Committee would disrupt either DOJ's role in screening judicial candidates for recommendation to the President, or the President's ability to seek advice from his immediate advisors on this subject. As DOJ states, the nomination process involves input not only from the ABA Committee, but from Senators, Presidential advisors, other governmental sources, and from private individuals. Matthews Declaration ¶ 2 (J.A.20). However, *individual* advisors to the President, whether private or government officials, are not covered at all by the Act. Nor does FACA apply to full-time government employees, such as appears to be the case with the President's judicial selection committee. Only those "*committees*" composed of private individuals are subject to FACA.

The only component in the nomination process possibly affected by FACA is the ABA Committee, and even that component did not play a part in it until 1952, prior to which hundreds of excellent judges were appointed to the bench by numerous Presidents. Thus, not only does the President's "core" power of appointment remain completely untouched by FACA, his implied power to receive advice on the exercise of that power is, for the most part, totally unaffected by FACA.

The procedural requirements of FACA stand in sharp contrast to other legislation that unconstitutionally interfered with the exercise of a substantive power of the President. *See, e.g, Myers v. United States*, 272 U.S. 52 (1926); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bowsher v. Synar*, 478 U.S. 714 (1986). The Executive is no more free to ignore the procedural requirements of FACA in the exercise of its decision-making powers than a court is free to ignore, for example, the Federal Rules of Evidence in exercising its judicial powers under Article III.

2. *The Lower Court Mistakenly Ignored The Exemptions In FACA That Accommodate Any Confidentiality Concerns.*

Even if the ABA Committee's advice is deemed necessary by the President, FACA itself contains express provisions for exemptions to the openness requirements. These exemptions have been invoked by the Executive in utilizing advisory committees that perform functions similar to those of the ABA Committee.

But even if assuming that confidential communications between the ABA and DOJ are considered necessary, despite the conflicting and vague claims on this issue, the lower court failed to let the law be applied in *any* of its aspects in order to determine whether the exemptions from disclosure found in FACA could accommodate them.

The court below apparently thought it had to give an "all or nothing" ruling rather than using its substantial equitable powers to fashion appropriate relief. For example, the court could easily have adopted the proposed orders submitted by both WLF and intervenor Public Citizen (J.A. 33, 58) which simply requests the district court to order the Justice Department to apply the law to itself and the ABA Committee in the first instance, at which point the court would get a better understanding of any problems that FACA may cause. In that regard, the lower court also failed in its duty to save as much of a statute as is constitutionally possible in order to give effect to the intent of Congress. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

While the court correctly noted that the deliberative process exemption under FOIA is inapplicable to advisory committee meetings (App. 24a, n.56), *see* Pub.

L. No. 94-409, Sec. 5(b), 90 Stat. 1247 (1976), the court failed to examine the other provisions of FACA that might well satisfy the alleged confidentiality concerns of the government. Thus, the government is free to invoke, for example, exemption (c)(6), dealing with meetings about personnel matters;[25] (c)(7), dealing with certain investigatory records used for law enforcement purposes;[26] or (c)(9)B, dealing with meetings where openness would frustrate implementation of policy.

D. Any Intrusion By FACA In The Nomination Process Is Outweighed By Congress' Need To Promote The Integrity Of The Decision-Making Process.

Assuming, *arguendo*, that the lower court was correct in concluding that there would be an intrusive impact in the application of FACA upon the Executive's role in the nominating process, that is only the beginning of the inquiry, for the court must then balance or weigh that intrusion with the Congressional interest in legislating in this area to see if the law is "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. GSA*, 433 U.S. 425, 443 (1977). The lower court simply stated that since the Senate has a constitutional role to play in the nomination process, the integrity of the decision-making process and the ABA Committee's role in it, "is satisfied through the confirmation proceedings" conducted by the Senate Judiciary Committee. App. 25a.

In appellant's view, the very fact that the Senate has a constitutional role to play in the judicial nominating process is evidence of greater, not less, Congressional authority in this area. Otherwise, one could argue that FACA and FOIA's "intrusion" on other Executive functions are not outweighed by the public interest in disclosure since oversight of those agencies or activities can be conducted by the respective committees in the Senate and House of Representatives. This argument could similarly be used to exempt from FACA coverage those committees which make recommendations to the President for legislative changes, since the Congress eventually would be called upon to consider any such initiatives.

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[25] *See, e.g.* 42 Fed. Reg. 64940 (1977) (President's Advisory Committee on Ambassadorial Appointments invoking 5 U.S.C. 552b(c)(6) to close meeting); 53 Fed. Reg. 49794 (1988) (National Institute of Health "peer review" advisory committee closing meeting under 5 U.S.C. 552b(4), (b)(6)).
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[26] *See, e.g., Information Acquisition Corp. v. Dep't of Justice*, 3 GDS ¶ 83,149 (D.D.C. 1981).

While there is some degree of public scrutiny available under the public confirmation process, that scrutiny is of a limited degree, especially with respect to the nomination of lower court judges where hearings are less than searching, or where the ABA Committee has not been forthcoming in explaining their investigative techniques and criteria as described earlier in this brief.

The lower court's complete reliance on the confirmation process as a sufficient public safeguard against abuses by the ABA Committee neglects altogether that part of the process completely closed to public scrutiny and accountability where a candidate is "vetoed" before his or her name ever gets to the President's desk, let alone to the Senate Judiciary Committee.

Finally, even if the Court were to find that the application of FACA to the ABA would intrude on the President's appointment powers, appellant submits that the significant public interest values underlying FACA, *i.e.*, the restoration of the public's integrity and confidence in the decision-making process, tips the balance in WLF's favor.

To uphold the lower court would bring into serious question not only this Court's prior rulings in this area, but raise constitutional questions about the constitutionality of FOIA, the Sunshine Act, and a host of other laws that can be said to apply to the exercise of the President's powers.

III. FACA WOULD NOT VIOLATE ABA'S FIRST AMENDMENT RIGHTS.

The ABA has alleged in its Complaint that application of FACA to its ABA Standing Committee on Federal Judiciary would violate the First Amendment rights of speech and association of the ABA Committee. *See* ABA Answer, Second Defense (J.A. 62). In the first place, appellant submits that it is premature to address this issue inasmuch as the court below did not have an opportunity to pass on it. Accordingly, it should be more appropriately addressed there should this Court reverse the district court on the separation of powers question. Nevertheless, we will briefly address the issue to demonstrate that any such claims are groundless.

In examining the permissible level of government regulation of the operation of private organizations, the Supreme Court considers to what degree the private organization is "private." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (state law requiring the Jaycees, a private organization, to accept women as regular members did not abridge the Jaycees' rights of expression and association.); *Hishon v. King & Spaulding* 467 U.S. 69 (1984). Applying the analysis in *Roberts* and its progeny to the case at bar, it is spurious to suggest that the ABA Committee is operating solely as a private organization and thus exempt from all of the provisions of FACA. Rather, the functions performed by groups such as the ABA constitute the exercise of *public* or quasi-public functions, which may even qualify the ABA Committee as "state actors" for purposes of liability under 42 U.S.C. 1983. *See Rouse v. Judges of Circuit Court of Cook County*, 609 F. Supp. 243 (N.D. Ill. 1985) (Chicago Bar Association constitutes "state actor" under section 1983 by acting as a screening committee for judicial candidates). *Cf. National Collegiate Athletic Ass'n v. Tarkanian*, 109 S.Ct. 454 (1988). The ABA Committee is performing precisely the same governmental functions as the CBA did in *Rouse*.

Accordingly, in considering the ABA's First Amendment argument, this Court should consider the obvious public and governmental functions being performed by the ABA Committee and reject their meritless suggestion that FACA cannot be applied to them.

Even if there is some intrusion on ABA's rights, the public purpose advanced by FACA far outweighs whatever first amendment rights of the ABA Committee are implicated. As has been noted in this brief, the legislative history of FACA is replete with Congress' proper concern with the need to open up the advisory committee process which heretofore had been carried out behind closed doors. Plaintiff submits that FACA is narrowly tailored to serve the compelling governmental interest of ensuring public accountability to the important role that advisory committees play in the decision-making process.[27]

Accordingly, the First Amendment argument should not be considered here since it was not raised below, and in any event, lacks serious merit.

IV. THE LOWER COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT WITHOUT ALLOWING APPELLANT TO TAKE DISCOVERY.

WLF submits that the facts adduced in this case are more than sufficient upon which to affirm the lower court's opinion with respect to the statutory issue, and that the "constitutional facts" are also sufficient to reverse to the lower court with respect to its finding of a violation of the separation of powers, especially since there was no application of FACA's exemptions which might accommodate those concerns. But if there is any doubt about those facts, either with respect to whether

the ABA Committee constitutes an "advisory committee," or whether the role they play and the impact of FACA on the Executive branch is such that there may or may not be a separation of powers violation, this Court should vacate the judgment and remand for further discovery on these points as requested by WLF when it filed its Rule 56(f) Affidavit seeking discovery below (J.A. 53).

As stated in that affidavit, certain alleged "facts" which may have influenced the court's decision in this case have not been precisely determined, such as whether the President "deems necessary" that the Attorney General receive the input from the ABA Committee as DOJ implies, and to determine more precisely what information is considered "confidential" by the DOJ and what is not. Fleshing out these facts would have put the case in a better factual setting for the court upon which to pass judgement. Under Fed.R.Civ.Pro. 56(f), a district court can either "refuse the application for [summary] judgment *or* may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or* may make such other order as is just." *Id.*(emphasis added). Thus, while the DOJ filed a motion to dismiss which was apparently converted into a motion for summary judgment, and while WLF filed an "alternative motion for summary judgment," the court, if it was not inclined to grant WLF's alternative motion, should have either stayed the motions or should have denied both, and allowed some discovery to take place. *See Beavis v. National Security Council*, No. 86-5359 (D.C. Cir., July 14, 1986)(order retaining jurisdiction of FOIA appeal, but remanding to district court for discovery to determine whether documents sought were Presidential and thus exempt from FOIA, or whether NSC as an "agency," had control of documents and thus subject to FOIA); *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071, 1072 (D.C. Cir. 1983)(further judicial review possible in FACA case in light of facts not in record).

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[27] *See Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978) (advisory committee "has no First Amendment right to have [agency] keep its communications secret").

CONCLUSION

For the foregoing reasons, the district court's opinion should be affirmed with respect to its resolution of the statutory issue, but should be reversed and remanded with respect to the constitutional issue.

Respectfully submitted,

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APPELLEE'S

BRIEF

Sup. Court, U.S.
F I L E D
[illegible]

[illegible] OF JUSTICE, and
[illegible] ASSOCIATION
[illegible]

[illegible] LEGAL FOUNDATION
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[illegible] Court

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QUESTIONS PRESENTED

1. Whether appellants lack standing under Article III to seek application of the Federal Advisory Committee Act ("FACA") to the ABA Standing Committee on the Federal Judiciary's ("ABA Committee's") process of assessing qualifications of the President's potential nominees to the federal judiciary.

2. Whether, absent a "clear statement" of congressional intent, FACA should be construed to apply to an independent, private organization which provides the President its evaluation of the qualifications of potential nominees to the federal judiciary, where the process for selecting and nominating individuals to the federal bench is reserved exclusively to the Executive Branch under Article II of the Constitution.

3. Whether the application of FACA to the ABA Committee in a way that interferes with the President's process of selecting and nominating individuals to the federal judiciary violates the Appointments Clause of Article II of the Constitution.

4. Whether the application of FACA to the members of the ABA Committee impermissibly infringes their First Amendment freedoms of speech and association, while failing to serve any compelling governmental interest that could not be satisfied by less intrusive means.

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BRIEF FOR APPELLEE
AMERICAN BAR ASSOCIATION

STATEMENT

The American Bar Association ("ABA") is a private voluntary professional association of approximately 343,000 attorneys throughout the United States. One of the principal goals of the ABA is to promote the administration of justice. In furtherance of this goal, the ABA established the ABA Standing Committee on Federal Judiciary (the "ABA Committee") in 1946.[1] Neither the ABA nor the ABA Committee was established by, is affiliated with or controlled by any federal or state governmental entity.

A. The Federal Judicial Appointment Process And The ABA Standing Committee On Federal Judiciary

The Constitution grants the President power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint" members of the federal judiciary. U.S. Const. art. II, § 2. In exercising this power of appointment, the President traditionally consults with many people, including Justice Department officials, members of Congress and the President's political advisors. Those individuals may, in turn, reflect the views and opinions of the law school community, practicing lawyers, state and local bar associations and many other sources. Public Citizen Jurisdictional Statement ("J.S.") App. 4a. During the course of the Senate confirmation process, the Senate—and, in particular, the Senate Judiciary Committee—considers a similarly wide range of views. This case involves appellants' efforts to invoke the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA" or "Act"), in regulating the efforts of one organization, the

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[1] *Report of the Special Committee on Judiciary*, 71 Annual Report of the American Bar Association 330-31 (1946). The ABA's interest in judicial selection long predates the establishment of the ABA Committee. *See, e.g., Report of the Committee on Judicial Selection*, 10 A.B.A. J. 820-24 (1924).

ABA, to gather information and to express its views during the judicial appointment process.

The ABA Committee for many years has evaluated the professional qualifications of prospective nominees for the federal judiciary. See ABA, *Standing Committee on the Federal Judiciary: What It Is and How It Works* 1 (1983) (*"Standing Committee"*), J.A. 43. In order to avoid compromising its position as a neutral evaluator, the ABA Committee never proposes or recommends candidates for the judiciary. *Id.* Rather, the ABA engages in peer review of the professional qualifications of persons identified by the President, through the United States Department of Justice, as potential nominees to the federal bench. J.S. App. 5a; see *Washington Legal Foundation* v. *American Bar Association Standing Committee on the Federal Judiciary*, 648 F. Supp. 1353, 1355 (D.D.C. 1986) (*"WLF I"*). The Committee's evaluation of prospective nominees to the federal judiciary has been provided to the President since 1952 and to the Senate Judiciary Committee since 1948. *Standing Committee*, J.A. 43.[2]

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[2] The ABA's relationship with the Justice Department was formalized by President Eisenhower and his Attorney General, Herbert Brownell. 78 Annual Report of the American Bar Association 224 (1953). At the Attorney General's request, the ABA at that time ceased recommending prospective nominees and instead provided evaluations of those prospective nominees identified by the Justice Department. *Id.* The original purpose of soliciting evaluations from the ABA was to provide an "outside" and objective evaluation of a prospective nominee's qualifications to serve in the federal judiciary and to avoid overtly political decisionmaking in the judicial selection process:

> The purpose of all this [the work of the ABA Committee] was to keep political cronies from ending up being placed on the bench. So we went to people—our predecessors went to people—who were, and are, highly respected, and said we want you to give us your best professional opinion about the competence of these people, not their political content, but their professional competence.

See Transcript of Proceedings, *Nomination Hearings of Anthony M. Kennedy Before the Senate Comm. on the Judiciary*, 69, 100 Cong., 1st Sess. (Dec. 16, 1987) (statement of Sen. Biden).

The initial fact-gathering on a prospective nominee usually is performed by the member of the ABA Committee for the Circuit in which the relevant judicial vacancy exists. J.S. App. 5a-6a; *Standing Committee*, J.A. 46-48. That Committee member examines the available legal writings of the prospective nominee and conducts confidential interviews with judges, law professors and lawyers in the potential nominee's community. The goal of the initial investigative process is to obtain information concerning the prospective nominee's professional competence, integrity and temperament. *Id.* at 47. The Committee member also will meet with the prospective nominee, affording that person the opportunity to discuss his or her qualifications and to respond to the information gathered during the initial interview process. J.S. App. 6a; *Standing Committee*, J.A. 48.

Confidentiality is absolutely essential to the Committee's work. If the persons interviewed knew that their opinions might be disclosed to the public or even to a federal agency, they would not be willing to speak candidly about the qualifications of a prospective candidate in whose court they might later appear. Because lack of candor would have a crippling effect on the Committee's evaluations, every attempt is made during the interview process to protect the confidentiality of information provided not only by the prospective candidate, but also by all other persons interviewed. J.S. App. 6a. The details of those interviews, including the identity of the interviewees, are not disclosed to the public or to the Justice Department. *Id.*

At the conclusion of the information-gathering process, the Circuit member prepares a confidential written report to the Chairman of the ABA Committee. This report contains a description of the prospective nominee's background, summaries of all interviews conducted (including the interview with the prospective candidate), an evaluation of the prospective nominee's qualifications and one of four recommended ratings ("Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified"). J.S. App. 6a. In cases where a rating of "Not Qualified" is a significant possibility, that fact is communicated orally to the Department of Justice before the process goes beyond the information-gathering stage. ABA Answer to Washington Legal Foundation ("WLF") Complaint, ¶¶ 11-12, J.A. 65-66. On occasion when that happens, the Department has informed the Committee that the prospective nominee's name was being withdrawn from consideration for a particular vacancy. *Id.*

Absent the Department's withdrawal of the nominee's name from consideration, the Circuit member sends to all members of the Committee a confidential formal report, the response to a personal data questionnaire and any other materials thought relevant by the Circuit member. *Standing Committee*, J.A. 48. After studying the formal report and its enclosures, each member transmits by mail or telephone a vote to the Chair. *Id.* If questions are raised, the ABA Committee may discuss the prospective nominee by telephone conference call or at a meeting. *Id.*

The Chair then confidentially informs the Attorney General, in a very brief report, of the ABA Committee's rating. J.S. App. 5a-6a. If the Committee has been unanimous in its rating, the report so states. *Id.* Otherwise, the report reflects the rating given by a majority or a substantial majority of the Committee. Thus, the ABA Committee, in reporting to the Department of Justice, discloses only the rating and the degree of unanimity of Committee members in reaching that rating. Neither the contents of the Circuit member's report nor the contents of any of the interviews or other background information are disclosed.

The rating of the ABA Committee, together with other information, such as the Federal Bureau of Investigation's reports and the prospective nominee's financial and medical background, are then considered by the Attorney General in making a recommendation to the President. J.S. App. 7a. If the President nominates the prospective nominee, the ABA Committee submits its rating to the

Senate Judiciary Committee prior to the Judiciary Committee's hearing on the nominee.[3]

B. The Federal Advisory Committee Act

FACA establishes "standards and uniform procedures" to govern, *inter alia*, the "operation" of federal advisory committees. 5 U.S.C. App. II §§ 2(a), (b)(4). Various requirements apply to groups that are found to be "advisory committees" within the meaning of the Act. For example, "an officer or employee of the Federal Government" (an "advisory committee management officer") is required to "chair or attend each meeting of each advisory committee" and advisory committees are flatly prohibited from conducting "any meeting in the absence of that officer or employee." *Id.* § 10(e). When chairing or attending such advisory committee meetings, the "management officer" is authorized to "adjourn" any meeting "whenever he determines it to be in the public interest." *Id.* FACA also requires advisory committees to provide advance notice of meetings and to hold open meetings, *id.* § 10(a), although a committee meeting may be closed to the public if the Government invokes one of the exemptions to the Government-in-the-Sunshine Act. *Id.* § 10(d). FACA further mandates that "the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda or other documents" provided to or prepared by an advisory committee must be made "available for public inspection and copying," although the Act permits the Government to withhold records falling within one of the exemptions to the Freedom of Information Act. *Id.* § 10(b). See also *infra*, 34-36 (listing other requirements of Act).

C. The Proceedings Below

On December 11, 1985, appellant WLF filed suit against the ABA Committee, its members and the ABA, to enjoin defendants to apply the requirements of FACA to the ABA "Committee's role . . . in the screening and selection of judicial candidates suitable for consideration by the President." WLF Br. 10. The WLF sought access to the meetings and information of the ABA Committee that the Committee allegedly had shared with "certain liberal activist groups," *id.*,[4] and sought an order reconstituting the ABA Committee so that it would have a "fairly balanced membership" in terms of points of view represented. *WLF I*, 648 F. Supp. at 1355 (quoting WLF complaint). The district court granted the ABA's motion to dismiss that complaint on the ground that FACA does not create a private right of action solely against a private group such as the ABA Committee. *Id.* at 1361 & n.7.[5]

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[3] In those instances—less than 1 percent of the nominations—where a President has nominated a person found "Not Qualified" by the ABA Committee, the Committee opposes the nomination. *Standing Committee*, J.A. 49.

On October 21, 1986, WLF filed its complaint in the present action against the United States Department of Justice requesting "declaratory and injunctive relief with respect to, *inter alia*, DOJ's failure to . . . require that [ABA Committee] meetings be open to the public, and DOJ's failure to maintain and provide the plaintiff and public access to advisory committee records." J.A. 5. WLF's complaint emphasized its interest in "participat[ing] further in the federal judicial selection process, including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public." WLF Complaint ¶ 3, J.A. 6. WLF also made clear in the complaint that it viewed access to the workings of the ABA Committee as a means to rectify a perceived ideological imbalance in the Committee. Its complaint stated that "[a]t least since the election of President Reagan in 1981, the ABA has investigated . . . judicial candidates' political and ideological philosophy . . . in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President." *Id.* at ¶ 10, J.A. 7.

On August 4, 1988, the district court granted the Justice Department's motion to dismiss the complaint or, in the alternative, for summary judgment. Although it concluded that the ABA Committee "falls within FACA's definition of advisory committee," J.S. App. 14a, the court held that application of FACA's requirements to the activities of the ABA Committee would violate the constitutional principle of separation of powers.[6]

The district court began its constitutional analysis by noting that there is a "specific fundamental distinction" between the Executive and Legislative Branches' roles in the judicial nomination process, and that distinction is clear from the "text of the Constitution." J.S. App. 17a. 19a. Article II, § 2, cl. 2 clearly grants to the President the sole authority to nominate judges, while reserving the power to advise and consent to the Senate. J.S. App. 15a. Thus, the court concluded that it would be unconstitutional to apply a statute, including FACA, that would "intervene in the Executive's selection process for judicial nominees." *Id.* at 19a.

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[4] Prior to filing suit, WLF, in correspondence with the ABA, requested that the ABA "provide us with the reports and minutes of all meetings of your committee held during the last two years . . . [and] inform us of the date and place of all future meetings." J.A. 15.

[5] That ruling is not at issue in this case. WLF has appealed *WLF I* to the Court of Appeals for the District of Columbia Circuit, which has held that proceeding (No. 87-7022) pending the outcome of this case.

[6] Subsequent to the filing of the Justice Department's motion, appellant Public Citizen requested and was granted leave to intervene. In its complaint, Public Citizen stated that one of its "primary objectives" as a public interest organization was to "increase government accountability through open government laws such as the FACA." Complaint ¶ 3, J.A. 25. Accordingly, Public Citizen sought to enjoin the Justice Department "to comply with the FACA's requirements when it utilizes the ABA Committee in the future." J.A. 26.

In addition, the court held that application of FACA to the ABA Committee's evaluation of judicial nominees would not survive the "more flexible, pragmatic approach" to separation of powers issues set forth in *Nixon* v. *Administrator of Gen. Services*, 433 U.S. 425 (1977). Under that standard, a statute with the "potential for disruption" of the "constitutionally assigned functions" of the Executive Branch may be upheld only if "justified by an overriding need to promote objectives within the constitutional authority of Congress." J.S. App. 19a-20a (quoting *Nixon*, 433 U.S. at 443). In this case, the court found that application of FACA created an "obvious and significant potential for disruption" of the President's ability to obtain "confidential, candid and timely advice concerning the qualifications of potential nominees for the federal courts." J.S. App. 20a.[7]

Finally, the court found no " 'overriding' congressional interest in application of FACA to the ABA Committee." J.S. App. 25a. The court reiterated that "the only role for Congress in the nomination process envisioned by the Constitution is the Senate's advice and consent function." *Id.* Moreover, the court stated that the congressional interest in the "accountability" of the ABA Committee is "satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA Committee and to request additional information." *Id.* Thus, "Congress can seek greater accountability directly, without interfering in the initial selection process through FACA." *Id.* Because WLF and Public Citizen were unable to "articulate[] any compelling, let alone overriding, congressional justification for applying FACA to the ABA Committee," the district court concluded that "application of

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[7] The court found that "application of FACA to the ABA Committee will discourage DOJ from consulting the ABA Committee or, alternatively, will discourage that Committee from continuing to perform the service of investigating and evaluating potential federal judicial nominees." J.S. App. 20a-21a.

the statute would, therefore, be unconstitutional." *Id.* at 26a.[8]

SUMMARY OF ARGUMENT

1. Article III of the Constitution requires a party who invokes a federal court's authority to show (a) that he or she personally has suffered some actual or threatened injury as a result of the purportedly illegal conduct of the defendant, and (b) that the injury is likely to be redressed by a favorable decision. In this case, neither of these requirements is met by either appellant.

Both appellants suggest that the Justice Department's "failure" to apply FACA properly has deprived them of access to ABA Committee meetings and documents and has precluded them from participating more effectively in the judicial selection process. Such allegations are precisely the type of abstract injuries—generally shared by every citizen—that this Court has deemed insufficient to confer standing. See, e.g., *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 470-71 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). Furthermore, both appellants now concede that, because of exemptions available under FACA, the meetings and documents of the Committee likely will remain confidential. See Public Citizen Br. 36-38, 41, 45; WLF Br. 40-41; Appellants Joint Motion for Divided Oral Argument at 2. Thus, under appellants' own view, a favorable decision in this case probably will provide *no* redress for their alleged "injury," *i.e.*, lack of access to the confidential workings of the ABA Committee. Accordingly, because appellants lack any distinct and palpable injury which is likely to be redressed if the requested relief is granted, they lack standing to pursue this litigation. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

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[8] After entry of judgment, the ABA intervened in the district court as a party defendant for the purpose of participating in this appeal in order to defend the judgment of the district court.

2. The relationship between the ABA Committee and the Executive Branch should not bring the Committee within the scope of FACA and subject the Committee to the intrusive regulatory scheme of that Act. The district court's wooden approach to statutory interpretation would result in application of FACA to *every* private organization whose views are regularly considered or otherwise "utilized" by the Executive Branch with respect to Presidential appointments. In applying a literalist interpretation, the district court erred by failing to require a clear statement of congressional intent before interpreting an Act of Congress to invade an area of decision-making traditionally and exclusively reserved to the Executive Branch. Compare *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 643-44 (1986). Under the overly broad interpretation of FACA advocated by appellants, in order for the Executive Branch to seek advice concerning Presidential appointments from a private organization, the Executive Branch must intrude into the operations of that organization by applying the Act—an anomalous result which maximizes the probability that application of FACA would violate the Appointments Clause and the First Amendment of the Constitution.

A careful examination of FACA's legislative history and the purposes underlying the Act indicates that FACA was never intended to interfere with the formulation and expression of a private organization's views concerning Presidential appointments or with the President's ability to obtain and consider such views. By enacting FACA, Congress sought to (a) reduce escalating and wasteful federal expenditures to finance the burgeoning number of advisory committees, and (b) diminish the influence of special interest groups, in particular regulated entities, over the formulation of federal policy as to which Congress had a legitimate role. Because neither of these purposes is implicated here, the Act should not be interpreted to apply to the ABA Committee.

3. The district court correctly held that "Congress cannot impose FACA in this case because of the specific limitation" of the Appointments Clause. J.S. App. 16a. That Clause vests in the President the exclusive authority over the nomination of federal judges. Accordingly, it is not for Congress to dictate or limit the means by which the President obtains advice in exercising his power to nominate federal judges. As the district court noted, "the conclusion that the Legislative Branch cannot intervene in the Executive's selection process springs directly from the text of the Constitution." J.S. App. 19a.

The appointment power, like the treaty power, is one area where the Constitution draws a clean line between what the President does and what Congress does. The Constitution gives the President the unfettered discretion to decide from which persons and groups to seek advice, and how to go about obtaining that advice. The Senate may advise and consent—but only after the candidate has been nominated. The Framers intended that the President alone bear responsibility for selecting judicial nominees and therefore could not have intended to allow Congress to interfere with the President's process of selecting nominees. The unqualified vesting of the appointment power in the President, plus the specific identification of the limited role played by Congress, make it abundantly clear that any congressional participation in the nomination and appointment of federal judges beyond the Senate's defined advice and consent power violates the Appointments Clause.

4. Application of FACA to the activities of the ABA Committee would substantially infringe the Committee's freedom of association. For example, appellants would require the ABA Committee to hold its meetings only with a government official in attendance and only "at the call of, or with the advance approval of" that government official. 5 U.S.C. App. II § 10(e)-(f). Moreover, WLF seeks an order requiring that all of the ABA Committee's meetings and records be opened to the public. J.A. 9-11. Thus, application of FACA would require

the government to regulate every aspect of the Committee's associational activities, including when it may meet, what it may discuss and with whom it must share its opinions.

Application of FACA also would substantially impair the Committee's right to free speech. In essence, WLF seeks to change the content of the ABA Committee's speech, see, e.g., WLF Br. at 7 n.5, 8 n.7, 9 n.8, by forcing government regulation of, and by obtaining access to, the Committee's internal deliberations and communications.

There is no compelling interest served by the infringement of the ABA's First Amendment rights. The only relevant interests are those of the Executive Branch and the Justice Department's position in this case makes plain that the Executive Branch does not believe that its interests are served by subjecting the ABA Committee to the requirements of FACA. To the extent that Congress has an independent interest in this process, it can be fully satisfied by exercise of its advice and consent powers.

ARGUMENT

I. APPELLANTS LACK STANDING TO ASSERT THE GENERALIZED GRIEVANCES ADVANCED IN THEIR COMPLAINTS.

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." Subsumed within this constitutional limitation is the requirement that a federal court plaintiff must have standing to challenge the action sought to be adjudicated in the lawsuit. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants', and that the injury

'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); see *Meese* v. *Keene*, 107 S.Ct. 1862, 1869 (1987); *Diamond* v. *Charles*, 476 U.S. 54, 65-67 (1986); *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984).[9]

A. Appellants Have Suffered No Injury In Fact As Required By Article III.

With respect to "actual injury," WLF has asserted that it is "adversely affected and aggrieved" by the Justice Department's failure to apply FACA to the ABA Committee because it "wishes to participate further in the federal judicial selection process" by attending and participating in meetings of the ABA Committee. WLF Complaint ¶ 3, J.A. 6. Similarly, Public Citizen states that it "has a significant interest in the federal judiciary, and the process by which federal judges are chosen, because it regularly brings cases in the federal courts on behalf of itself and others." Public Citizen Complaint ¶ 3, J.A. 25.[10] Thus, both appellants' complaints suggest that the Justice Department's "failure" to apply FACA properly (and thereby provide them with access to ABA Committee meetings and documents) has resulted in some "lost opportunity" to participate more effectively in the judicial selection process.

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[9] This Court also has adhered to the principle that the Court will refrain from adjudicating "abstract questions" of law which amount to "generalized grievances" pervasively shared by the public at large. *See Warth* v. *Seldin*, 422 U.S. at 499-500.

[10] The only other suggestion of possible injury is Public Citizen's statement that "its effectiveness in many areas [*i.e.*, public education, lobbying and litigation] is dependent on its access to advisory committees and their documents." Public Citizen Complaint ¶ 3, J.A. 25. In essence, Public Citizen—which seeks to "increase government accountability through open government laws such as the FACA" (J.A. 25)—is claiming an "institutional" interest in having the law interpreted properly. It is clear, however, that generalized harm to Public Citizen's institutional and litigating interests does not constitute the "distinct and palpable injury" (*Valley Forge*, 454 U.S. at 475) necessary to satisfy Article III. Moreover, that is the type of "generalized grievance" "shared in substantially equal measure by all or a large class of citizens" which has been held not to constitute an "injury" sufficient to

Such allegations are precisely the type of unspecified and "abstract" injuries that this Court has deemed insufficient to confer standing. See *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216-227 (1974); *Allen* v. *Wright*, 468 U.S. 737, 752-53, 757-59 (1984). Neither appellant has pointed to any specific instances where lack of access to ABA Committee information has impaired its ability to make its voice heard in the judicial nomination process. Indeed, appellants plead no specific facts that would place this dispute in a "concrete factual context conducive" to litigation of this issue. *Valley Forge*, 454 U.S. at 472.

Whatever interests the appellants have in the competence, integrity and judicial philosophy of federal judges—and in the role of the ABA Committee's evaluations in the nomination of those judges—are shared by every citizen. The case and controversy requirement of Article III requires much more than an unfocused allegation of interest. As this Court stated in *Valley Forge*:

> Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

Valley Forge, 454 U.S. at 473. At bottom, appellants simply are complaining about an intangible injury to

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confer standing. *Warth* v. *Seldin*, 422 U.S. at 499; *see Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100.

their particular value interests. They believe, but cannot show, that those interests would be better served if they had access to the deliberations and documents of the ABA. But, "Article III requires more than a desire to vindicate value interests . . . ." *Diamond* v. *Charles*, 476 U.S. at 66. Accordingly, appellants lack the actual and concrete injury necessary to provide standing in this case.[11]

B. There Is No Discernible Relationship Between The Injury Asserted By Appellants And Any Relief They Could Receive In This Case.

Even if appellants had alleged an adequate injury in fact, "a mere showing of personal injury is not sufficient to establish standing; [this Court has] also required that the injury be 'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Meese* v. *Keene*, 107 S.Ct. at 1869. These requirements of "causation" and "redressability" constitute independent grounds for denying standing—even where "injury in fact" exists. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §§ 3531.5-3531.6 (1984); see *Allen* v. *Wright*, 468 U.S. at 751-53; *Heckler* v. *Mathews* 465 U.S. at 738; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38, 41; *Warth* v. *Seldin*, 422 U.S. at 499.

Both appellants now essentially have conceded that a favorable decision in this case will provide no redress for their claimed "injury," *i.e.*, a lack of access to information regarding the confidential workings of the ABA Committee. See WLF Complaint ¶ 3, J.A. 6; Public Citizen Complaint ¶ 9, J.A. 26; see also *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38,

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[11] In fact, appellants have not demonstrated why FACA should be construed to give rise to an implied cause of action under any circumstances. *See Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979).

41. Public Citizen expressly has disavowed "extreme and unrealistic requests for relief" (Public Citizen Br. 38 n.7), stating that it is, instead, seeking only to impose the "threshold requirements" of FACA on the ABA Committee.[12] In fact, Public Citizen concedes that "most, if not all, of the ABA Committee's discussions" of potential nominees would be kept confidential under the exemptions to the Act. Public Citizen Br. 45; see *id.* at 36, 38, 41; Appellants' Joint Motion for Divided Oral Argument at 2. Similarly, WLF now has seemingly disavowed its earlier demands for immediate access to ABA Committee meetings and documents and essentially has adopted the position that application of FACA will lead to no public disclosure of information. See WLF Br. 40-41. Indeed, WLF now emphasizes that its proposed order for the district court requests only a declaration that "the defendant Justice Department's utilization" of the ABA Committee is "covered by" FACA. J.A. 33

Thus, this case squarely falls within that line of decisions which rests on the "Article III requirement" that "the plaintiff who seeks to invoke judicial power [must] stand to profit in some personal interest . . . ." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 39. In *Eastern Kentucky*, standing was denied to a group of indigent plaintiffs who sought to challenge an Internal Revenue Service regulation which reduced the amount of indigent services that a hospital had to provide in order to maintain its status as a charitable organization. Despite allegations that the plaintiffs had in fact been denied services by hospitals subject to the regulation, standing was denied on the ground that it was "purely speculative" whether these particular plaintiffs had been denied treatment *because* of the regulation in question and

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[12] According to Public Citizen, the "threshold requirements" of the FACA are (1) filing a charter; (2) designating a federal oversight officer; and (3) announcing committee meetings in advance. Public Citizen Br. 9.

whether invalidation of the regulation would in fact result in a change of hospital policies. 426 U.S. at 42-46.[13]

Appellants' showing of causation and likelihood of redress is far more tenuous than those in *Eastern Kentucky*, *Warth* v. *Seldin*, or *Allen* v. *Wright*. At bottom, both appellants have conceded in this Court, as they must, that the meetings and documents of the ABA Committee should *not* be made public. Indeed, if the work of the Committee is to be of any use to the Executive Branch in the nominating process, it must be done in confidence. Success in this litigation would disrupt the work of the Committee,[14] but there is no reason to assume that it would result in the public release of *any* information—or provide any other tangible benefit—to appellants. Thus, because appellants lack any distinct and palpable injury that is likely to be redressed if the requested relief is granted, they lack standing under Article III to pursue this litigation.

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[13] *See also Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973) (denying plaintiff standing to enjoin enforcement of criminal statute requiring payment of child support, despite undisputed injury, on ground that link between criminal enforcement and actual payment was "only speculative"); *Warth* v. *Seldin*, 422 U.S. at 508 (denying standing to low and moderate income persons seeking to challenge certain exclusionary zoning restrictions because there was no evidence that plaintiffs would obtain housing absent the zoning ordinances); *Allen* v. *Wright*, 468 U.S. 737 (1984) (denying standing to parents of children in public schools, who sought to challenge tax exempt status of private schools that discriminated on the basis of race because there was no showing that a change in tax exempt status would affect attendance at private schools).

[14] For example, the application of FACA would (1) allow a federal "Management Official" to attend and essentially control Committee meetings (§ 10(e)-(f)) and (2) result in the disclosure of Committee documents to the Justice Department. Thus, despite the fact that the workings of the Committee might be shielded from *public* scrutiny—and appellants would gain no concrete benefits—application of FACA would have a substantial detrimental effect on the workings of the ABA Committee and would call into serious question the ABA's continued ability to provide useful evaluations to the Justice Department. *See infra*, 34-37.

II. CONGRESS DID NOT INTEND FACA TO APPLY TO THE EXECUTIVE BRANCH'S USE OF ADVICE FROM PRIVATE ORGANIZATIONS CONCERNING PRESIDENTIAL APPOINTMENTS.

A. The District Court's Overly Literal Interpretation Of FACA Is Contrary To The Applicable Rules Of Statutory Construction.

Section 3 of FACA defines the term "advisory committee" as "any committee" which is:

> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ."

5 U.S.C. App. II § 3(2). The statutory issue in this case is whether the ABA Committee is a "committee . . . which is utilized by the President . . . or utilized by one or more agencies" as Congress intended those terms to be applied under FACA.

Under the interpretation of FACA urged by appellants, *any* private organization whose opinions or recommendations are regularly considered by the Executive Branch is "utilized" within the meaning of the statute and therefore subject to FACA. Thus, for example, if a President regularly accepts advice with respect to Labor Department appointments from the AFL-CIO, or advice with respect to appointments in the Department of Veterans' Affairs from the American Legion, or advice concerning potential nominees to the EEOC or EPA from the NAACP or Sierra Club, each of those organizations would become subject to FACA. But, the notion that federal officials must attend and have power to control a private organization's meetings and files in order for that organization to provide advice with respect to

Presidential Appointments is patently absurd.[15] That notion never was contemplated, and certainly not intended, by Congress.[16]

The fundamental error in the interpretation of the statute adopted by the district court and advocated by the appellants is that both presume that Congress intended to regulate an area that the Constitution exclusively commits to the Executive Branch. But this Court has long recognized that Congress will not be presumed to alter the constitutional balance of power by entering an area traditionally regulated by another governmental entity absent a "clear statement" of congressional intent. See *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 643-44 (1986); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 354-355 (1941); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940); *United States* v. *Bass*, 404 U.S. 336 (1971).[17]

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[15] Statutes should not be interpreted literally if such an interpretation leads to an absurd result. *United States* v. *Bryan*, 339 U.S. 323, 338 (1950); *United States* v. *Brown*, 333 U.S. 18, 26-27 (1948).

[16] For nearly a century, this Court has recognized that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). *See also United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (1975); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[17] In the *Bowen* line of cases this Court has held that it would not presume that Congress, in legislating pursuant to its Commerce Clause power, intended to regulate an area traditionally left to the states absent a "clear statement" by Congress that it intended to do so. The Court has applied this "clear statement" doctrine even though Congress has *plenary* authority to act pursuant to its Commerce Clause power and the federalism interest protected under the doctrine is only *implicit* in the Constitution. It would be anomalous, to say the least, to have a rule of construction which requires Congress to make its intentions clear before interfering with traditional state prerogatives, and yet allow Congress to invade unwittingly the exclusive authority of the Executive Branch *explicitly* set forth in the Constitution, particularly where congressional authoirty vis-a-

What is striking about this case is that, unlike other recent separation of powers cases, it is clear that Congress, in enacting FACA, did not seriously consider any potential separation of powers issues. By contrast, when Congress chose to impose a sentencing commission on the judiciary, to permit an independent prosecutor to oversee Executive Branch activities, and to allow a congressional agency to set spending limits upon the Executive Branch, it did so with a clear intention to test the limits of the separation of powers doctrine in order to serve a significant governmental purpose identified by Congress. Under appellants' theory, Congress in this case has stumbled into a serious constitutional issue. Before this Court entertains a significant separation of powers issue, it should satisfy itself that Congress intended FACA to be interpreted in a manner that would create a constitutional issue for this Court to resolve. Because it is clear that Congress had no such intent in enacting FACA, this Court should limit the reach of FACA to those committees Congress clearly intended to reach, *i.e.*, committees established by or for the benefit of a federal agency. See *infra*, 22.

The interpretation of FACA adopted by the district court also fails to adhere to the well-established principle that a statute should be interpreted, if reasonably possible, to avoid serious constitutional questions. See, e.g., *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Although the court below acknowledged this fundamental principle of statutory interpretation (J.S. App. 14a), it

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vis Presidential nominations is not plenary but, at best, *doubtful*. *See infra*, 27-34.

The clear statement rule, as advocated by the ABA here, is a narrow one because it would apply only to those executive powers—such as the pardon power, the power to make treaties and the appointment power—which are particularly enumerated in Article II as belonging exclusively to the Executive Branch. Given the unique status of these few "enumerated" executive powers, it would be a small or nonexistent burden for Congress to speak clearly when it intends to legislate in a way that affects these powers.

adopted the broadest possible interpretation of FACA—an interpretation that places the Act in direct confrontation with constitutional constraints on Congress' power. See *infra*, 26-48.[18]

B. Congress Did Not Intend FACA To Apply To Organizations Such As The ABA Committee.

1. The term "utilized" was not included in either the original House or Senate bills. The House bill limited the definition of "advisory committee" to a committee "*established*" by statute, the President, or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies." H.R. 4383, 92d Cong., 2d Sess. § 3(2), 118 Cong. Rec. 16300 (1972), *reprinted in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts and Other Documents*, 95th Cong., 2d Sess. 301 (Comm. Print 1974) (emphasis added) (hereinafter "*Source Book*"). The Senate bill defined the phrase "agency advisory committee" as a committee or similar group "*established* or *organized* under any statute or by the President or any officer of the Government for the purpose of furnishing advice, recommendations, or information to any officer or agency . . ." S. 3529, 92d Cong., 2d Sess. § 3(1) (1972), *reprinted in Source Book* at 174-75 (emphasis added); see S. Rep. No. 1098, 92d Cong., 2d Sess. 2 (1972), *reprinted in Source Book* at 152; *id.* at 156-57; 118 Cong. Rec. 30271-72 (1972) (remarks of Sen. Metcalf), *reprinted in Source Book* at 198.

Both the district court (J.S. App. 8a) and appellants rely upon the broad definition of "established" or "organized" to support the proposition that "utilized" also should be broadly interpreted. But the available evidence shows that Congress did not intend "utilized" to have the literal meaning ascribed to it by appellants.

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[18] Contrary to appellants' claims, the courts applying FACA have recognized that, because of the breadth and imprecision of FACA's language, a literal application of the statute would "threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine." *National Anti-Hunger Coalition* v. *Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

The term "utilized" was added to the current definition of "advisory committee" in the conference committee. See H.R. Rep. No. 1403, 92d Cong., 2d Sess. 2, 9 (1972), *reprinted in Source Book* at 316, 323; 118 Cong. Rec. 31420-21 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 331. It is clear from the Report's language, however, that Congress did not intend that this term would be construed expansively. Rather, Congress intended the term "utilized" to reach only those committees that were established *by* an agency or those established by a private group *for* an agency or at an agency's request. The Conference Report plainly states that "[t]he Act does not apply to . . . advisory committees not directly established *by or for such agencies.*" *Id.* at 324 (emphasis added).[19] Because the ABA Committee —which was established in 1946, prior to the development of its relationship with the Executive Branch (see *supra*, 1-2)—was not established "by or for" the Department of Justice, it does not fall within the definition of "advisory committee," as that term was used by Congress.

2. Congress enacted FACA to achieve two broad purposes: (1) to control and reduce the costs of advisory committees, in part by eliminating some of them;[20] and

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[19] This construction was reiterated in a colloquy on the floor of the House. 118 Cong. Rec. 31421 (1972) (statement of Rep. Holifield), *reprinted in Source Book* at 332.

[20] *See* 118 Cong. Rec. 16296 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 293; 118 Cong. Rec. 30271-72 (1972) (statement of Sen. Metcalf), *reprinted in Source Book* at 198; 118 Cong. Rec. 30274 (1972) (statement of Sen. Percy), *reprinted in Source Book* at 201; 118 Cong. Rec. 30278 (1972) (statement of Sen. Brock) *reprinted in Source Book* at 209. Prior to the enactment of FACA, some Presidential advisory committees apparently spent over $1 million in federal funds, only to have their reports ignored. S. Rep. No. 1098, 92d Cong., 2d Sess. 3 (1972), *reprinted*

(2) to diminish the influence of regulated entities in policy matters over which the Congress has legislative authority.

Throughout the legislative history, there are clear indications that Congress intended FACA to protect *its own policy-making prerogatives* from the influence of quasi-legislative advisory committees.[21] FACA was designed to control the "system of advisory committees that has grown up over the years [that] might well be described as a fifth arm of the Government, existing alongside the executive, legislative, judicial and regulatory arms. There is a growing awareness that an invitation to advise can by subtle steps confer the power *to regulate and legislate.*" S. Rep. No. 1098, 92d Cong., 2d Sess. (1972) *reprinted in Source Book* at 163 (emphasis added).[22]

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in Source Book at 153. The cost of these committees had been a longstanding concern of the Congress. *See* 5 Stat. 533; 35 Stat. 1027; 58 Stat. 337.

[21] S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972) (emphasis added), *reprinted in Source Book* at 151; *see also* 118 Cong. Rec. 30271-72 (1972) (remarks of Sen. Metcalf), *reprinted in Source Book* at 197-98; 118 Cong. Rec. 16299-300 (1972) (statement of Rep. Brown), *reprinted in Source Book* at 299-300; 118 Cong. Rec. 30273-74 (1972) (statement of Sen. Percy), *reprinted in Source Book* at 201; 118 Cong. Rec. 16296 (1972) (statement of Rep. Monagan), *reprinted in Source Book* at 293; House Comm. on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970), *reprinted in Source Book* at 218.

[22] Congress also believed that many functions performed by advisory committees established by the Executive Branch and Congress should be performed by standing congressional committees. *See* 118 Cong. Rec. 16300 (1972) (statement of Rep. Brown), *reprinted in Source Book* at 300; *The Role and Effectiveness of Advisory Committees, Source Book* at 221. Advance notice of the creation of an advisory committee would provide Congress the "opportunity to challenge the establishment of such committees they felt were not necessary or were not relevant." S. Rep. No. 1098, *reprinted in Source Book* at 163.

Congress was particularly concerned about advisory committees that had become little more than fora for regulated special interests to persuade government regulators to adopt pro-industry positions—without the knowledge of Congress or any public scrutiny. By enacting FACA, Congress intended to strengthen its authority and to ensure that policy decisions were not unduly influenced by regulated entities. See *Natural Resources Defense Council, Inc.* v. *Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986).

3. Neither of the congressional concerns underlying the enactment of FACA is relevant to the activities of the ABA Committee in evaluating the professional qualifications of nominees to serve as federal judges. First, because no federal funds are expended by the Committee, the congressional goal of reducing federal expenditures and eliminating duplicative advisory committees is inapposite.

Second, the President's use of the ABA Committee does not implicate the congressional goal of eliminating or minimizing the influence of private parties—particularly regulated industries—over the formulation of government policy in areas where congressional policy should control. Congress simply has *no policy-making interest or authority* with respect to the President's decision to nominate a particular candidate to the federal judiciary. The only authority of Congress under the Appointments Clause is the Senate's power to confirm or reject the President's nominees to the bench. See *infra*, 27-34.[23]

Thus, there is no evidence in the legislative history that Congress intended to reach a committee, such as the ABA Committee, that assists the President in the

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[23] Moreover, the ABA Committee clearly is not a federally regulated special interest similar to those that motivated the Congress to enact the open meeting, public access and balanced membership provisions of FACA. By evaluating the professional qualifications of candidates to the federal bench, the ABA is not attempting to promote its particular viewpoint to a federal agency that regulates the ABA.

exercise of a core constitutional function exclusively assigned to the Executive Branch—as opposed to execution of congressional policy, as reflected in a federal law.[24]

4. Any notion that Congress intended in enacting FACA in 1972 to invade the Executive Branch's exclusive province to nominate federal judges is belied by the Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978), in which Congress specifically recognized the constitutional limits against interfering in the judicial appointment process. In the Omnibus Judgeships Act, Congress conditioned an increase in the number of federal judges on the promulgation and publication by the President of standards and guidelines for the selection, on the basis of merit, of nominees for district court judgeships. This Act expressly recognizes

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[24] Nor is there any support for the suggestion that "entities" similar to the ABA Committee were "clearly within Congress' contemplation when it drafted FACA." Public Citizen Br. 20. During fiscal year 1987, 177 federal advisory committees had some responsibility for federal grant review activities. *See Sixteenth Annual Report of the President on Federal Advisory Committees Fiscal Year 1987* at 1, 2 (1988). Contrary to appellants' assertion (Public Citizen Br. 5; WLF Br. 23-24), the ABA Committee is not similar to committees that decide who should receive federal largesse in the form of grants. First, there is no constitutional obstacle to the application of FACA to such committees because Congress may regulate these committees pursuant to its enumerated spending power provided in Article I. Second, the functions performed by these committees do not involve governmental power—such as the power to nominate—that is textually committed by the Constitution to the Executive Branch.

Similarly, appellants' references to the Tower Commission are inapposite. *See* WLF Br. 22 n.13; Public Citizen Br. 25. The Tower Commission, unlike the ABA Committee, was "established by" the Government and resulted in the expediture of governmental funds. Moreover, the fact that the President voluntarily chooses to apply FACA to an advisory committee on a politically sensitive subject has no bearing on the question whether the Constitution permits Congress to require the President to apply FACA where, as here, he objects to the intrusion on exclusive Executive prerogatives.

that the President can waive such standards and that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply with these provisions." 28 U.S.C. § 133.[25] Given Congress' express recognition of the limits of its legislative authority in the area of federal judicial appointments, it is plain that Congress did not intend FACA to be applied to private committees providing advice on such appointments. In any event, Congress has not expressed its intention with sufficient clarity to require this Court to construe FACA broadly enough to cover the ABA Committee and thereby intrude into the President's area of traditional and exclusive control over nominations.

III. APPLICATION OF FACA TO THE PRESIDENT'S AND JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE WOULD VIOLATE THE APPOINTMENTS CLAUSE.

As the district court correctly held, the President, in exercising exclusive authority to nominate individuals to the federal bench, relies upon the investigations and evaluations of the ABA Committee. The application of FACA, which would effectively undermine the historical usefulness of the ABA Committee in providing an "outside" evaluation of prospective nominees, would impermissibly interfere with the President's nominating authority. This interference violates the Appointments Clause.

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[25] The legislative history of this Act makes it clear that these provisions are precatory because the Congress recognized the constitutional limits on its power to control or regulate the President's selection process. As the Chairman of the House Judiciary Committee explained: "We feel this language [regarding the merit selection guidelines] is not only acceptable, but is in keeping with what are, frankly, constitutional realities. We have no power to circumscribe the President's nominating authority . . . ." 124 Cong. Rec. 33510 (1978) (statement of Rep. Rodino); *see* H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978); 124 Cong. Rec. 34544-45 (1978) (statement of Sen. Bayh) (even advisory selection procedure legislation poses separation of powers problems).

A. The President Has Exclusive Constitutional Authority To Nominate Persons To The Federal Judiciary.

The text of the Constitution, the history of the Appointments Clause and the opinions of this Court uniformly demonstrate that the *only* role of Congress in the selection, nomination and appointment of Article III judges is the advice and consent power of the Senate. Appellant WLF's argument that "the Senate was always considered to have a significant role to play in the [appointment] process" beyond its confirmation authority simply is wrong. WLF Br. 30.[26]

1. The Appointments Clause itself vests broad and unfettered discretion in the President to nominate candidates to the federal bench, subject only to the Senate's *subsequent* role of advice and consent.[27] Under the Appointments Clause, the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,

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[26] App[illegible] Public Citizen does not argue that Congress has a constitutional role beyond the Senate's advice and consent authority, but instead states that the proposed application of FACA to the ABA would somehow "further[] the Senate's understanding of the role and processes of the ABA Committee [and] certainly place the Senate in a better position to perform its advice and consent function effectively." Public Citizen Br. 31. But Congress does not need to apply FACA to perform fully its advice and consent function and, in any event, FACA does not apply to committees utilized by Congress. *See* 5 U.S.C. App. II § 3(2).

[27] Despite WLF's suggestion to the contrary (*see* WLF Br. 36-37), the district court correctly ruled that the fact "[t]hat the Attorney General acts as an intermediary between the ABA Committee and the President does not significantly alter the constitutional analysis." J.S. App. 11a n.31. The "President has partially delegated this responsibility to amass, collate, and analyze information from various sources and in consultation with others (including the President) to DOJ" but "[i]n the end, of course, it is the President, vested by the Constitution with the power of appointment, who makes the nomination." *Id.*

> other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for . . . .

U.S. Const. art. II, § 2, cl. 2.[28] The plain language of the Constitution sets forth the broad authority of the President to "nominate" and the Senate's distinct authority simply to confirm or reject the President's nominees.

The structure of the Constitution also supports a limited interpretation of the advice and consent power. It is significant that the only grant of congressional authority regarding judicial appointments is contained in Article II, Section 2. As this Court has noted:

> The words of section 2 [of Article II], following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used.

Myers v. *United States*, 272 U.S. 52, 118 (1926).[29] Thus, the power of advice and consent—as a limitation on the

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[28] Based on the language of the Appointments Clause which authorizes Congress to vest the appointment of "inferior officers" in "the President alone, Courts of Law, or Heads of Departments," WLF suggests that Congress could divest the President of the power to appoint judges of inferior courts. WLF Br. 33-35. This may be the logical conclusion of WLF's argument, but it is plainly wrong. This Court's decision in *Morrison* v. *Olson*, 108 S.Ct. 2597 (1988), makes clear that Article III judges are not "inferior officers" within the meaning of the Appointments Clause. *See id.* at 2608-09 (independent counsel is inferior officer because of limited duties, limited jurisdiction, limited tenure and removal power vested in Attorney General).

[29] James Madison suggested during the Constitutional Convention that a specific grant of the appointment power to the Executive would be unnecessary because such a power would be included within the broader executive power. He concluded, however, that the inclusion of the specific grant of appointment power "might serve to prevent doubts and misconstructions." 1 *The Records of the Federal Convention of 1787* 67 (M. Farrand ed. 1966).

President's executive authority—must be strictly construed.

2. The history of the Appointments Clause at the Constitutional Convention similarly supports the conclusion that congressional authority in this field of judicial nominations and appointments is narrowly limited to the Senate's advice and consent power. Although there was substantial debate over "who should have the authority to appoint judges," *Morrison* v. *Olson*, 108 S.Ct. at 2610, the history is revealing on several points. First, after considerable debate, the Framers ultimately determined to vest the Executive with the sole constitutional nominating authority, to be checked only by Senate confirmation. Second, those who prevailed in advocating a broad grant of authority to the President believed that it was critical that the responsibility for nomination be vested in a single person—rather than in a more diffuse and unaccountable Congress. Finally, the Framers uniformly believed it appropriate to vest the power over judicial nominations in the branch with the most access to information about prospective nominees to the judiciary.

An early draft of the national constitution provided "that the national Judiciary be chosen by the National Legislature." 1 *The Records of the Federal Convention of 1787* 119 (M. Farrand ed. 1966) (hereinafter "Farrand"). James Wilson, who opposed this clause, stated that "[a] principal reason for unity in the Executive was that officers might be appointed by a single, responsible person." *Id.*[30] When, on July 18, 1787, the convention again returned to the issue of judicial appointments, the Framers took up consideration of Resolution number

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[30] *See Morrison* v. *Olson*, 108 S.Ct. at 2610. James Madison moved that this provision be deleted and suggested that the Convention revisit this issue after determining how the executive would be selected. 1 Farrand at 232.

11, which established a National Judiciary, to consist of a single tribunal, "[t]he Judges of which to be appointed by the 2d branch of the Natl. legislature." 2 Farrand at 41. Again, there was a suggestion, this time by Madison, that the Executive appoint judges and that the Senate be given the power to object or concur. He argued that "[t]his would unite the advantage of responsibility in the Executive with the security afforded in the 2d branch agst. any incautious or corrupt nomination by the Executive." 2 Farrand at 42-43.[31]

On August 31, 1787, the appointment provisions of the draft constitution were referred to the Committee on Eleven which, on September 4, reported to the Convention a substitute that provided:

> The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for.

2 Farrand at 495. This new language was approved by the Convention on September 7. See 2 Farrand at 539-40; see also *Buckley* v. *Valeo*, 424 U.S. 1, 131 (1976).

The Framers' ultimate decision to lodge the nominating authority solely in the Executive Branch, in order to ensure accountability and responsibility, was forcefully supported by Hamilton in *The Federalist* No. 76, from which the district court quoted extensively. J.S. App. 17a. Hamilton wrote:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a

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[31] Madison also noted that the President "would in general be more capable and likely to select fit characters than the Legislature." 2 Farrand at 80-81. Three days later, when the Convention reconsidered Madison's motion, Gouverneur Morris reiterated that the Executive would be better informed than the Senate. *Id.* at 82. Despite these arguments, the motion to empower the Executive to appoint, and to require approval by the Senate, was defeated. 2 Farrand at 83.

> more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to it. In the act of nomination his judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment.

The Federalist No. 76 (Rossiter ed. 1961); see Story, *Commentaries on the Constitution* § 1529 (3d ed. 1858).[32] Thus, Hamilton explicitly recognized the critical role of the President's ability to conduct a thorough investigation prior to nomination—a vital function that would be frustrated by application of FACA to the ABA Committee.[33]

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[32] In *The Federalist* No. 77, Hamilton again emphasized the personal accountability that results from vesting the sole nominating authority in the President, this time by drawing a comparison with a method of state judicial selection by committee:

> In that plan [*i.e.*, the federal Constitution] the power of nomination is unequivocally vested in the executive. [Under the federal system,] the circumstances attending an appointment . . . would naturally become matters of notoriety and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the president singly and absolutely.

Appellant Public Citizen quotes extensively from Hamilton's critique of the state nominating system and argues that application of FACA is consistent with increasing "public accountability" and thereby eliminating the very evils noted by Hamilton. Public Citizen Br. 30-31. But that argument misses the point—the Constitution itself strikes the balance that eliminates the evils noted by Hamilton.

[33] Other writing by the Framers indicates their belief that the President's power to exercise his nominating authority ought to be unrestricted. John Adams wrote:

> The President . . . ought to select the men best qualified and most meritorious for offices at his own responsibility, *without being shackled by any check by law, constitution, or institu-*

Not only do the debates and writings of the Founders buttress the conclusion that the President's nomination power is exclusive and plenary, they also make clear that the *only* formal congressional role is Senate confirmation after the nomination is announced.[34] Again, Hamilton is the best source of the Framers' intent:

> To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

The Federalist No. 76. Thus, the Framers intended Congress to have *no* power directly to affect the selection or nomination of candidates to the federal bench; the Senate was limited to the indirect, "silent" role of saying "yes" or "no" to the President's selections.[35]

> *tion.* Without this unrestrained liberty, he is not a check upon the legislative power nor either branch of it.

IX *Works of John Adams* 634 (C.F. Adams ed. 1850-Reprint 1969-Books for Libraries Press) (emphasis added).

[34] With regard to the Senate's need to have information regarding nominees, Madison stated that:

> the Executive & Senate in the cases of appointments to Office & of Treaties, are to be considered as independent of and coordinate with each other. If they agree the appointments or treaties are made. If the Senate disagree they fail. If the Senate wish information previous to their final decision, the practice, keeping in view the constitutional relations of the Senate & the Executive has been either to request the Executive to furnish it, or to refer the subject to a committee of their body to communicate either formally or informally with the head of the proper Department.

4 *The Founders Constitution* (Kurland and Lerner, eds. 1987) 112.

[35] WLF makes much of the long-standing practice of senatorial courtesy whereby the President may consult with Senators with respect to nominees to the federal bench in their state. WLF Br. 30-32. While the existence of such a practice is undisputed, it

3. Finally, in addition to the language, structure and history of the Appointments Clause, this Court's decisions also reject any broader role for Congress beyond that of confirming the President's nominees. "[T]he moment an office and its powers and duties are created, the power of appointment . . . as limited by the Constitution, vests in the Executive." *Myers* v. *United States*, 272 U.S. at 118, 130-31; see *Buckley* v. *Valeo*, 424 U.S. at 132. Thus, Congress may control the President's process of selecting and nominating individuals to the federal bench only through the narrowly constrained authority of the Senate to advise and consent. *Myers*, 272 U.S. at 164; see *Buckley* v. *Valeo*, 424 U.S. at 121.

The President's authority to nominate judicial candidates is closely analogous to another power of the President under Article II, Section 2—the power to "make" or negotiate treaties, with the advice and consent of the Senate. With respect to the treaty power, this Court has stated:

> [the President] makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). It is clear that Congress is equally "powerless" to impose any conditions, limitations or restraints on the Presidential power to select and nominate individuals to the federal judiciary.[36] In both cases, the

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clearly is a matter of Presidential political choice and has no bearing on the constitutional issues in this case.

[36] Appellants are wrong in arguing that this Court's decisions in *Mistretta* v. *United States*, 109 S.Ct. 647 (1989), and *Morrison* v. *Olson*, 108 S.Ct. 2597 (1988), control the outcome in this case. Neither of these cases involved congressional interference with a power of the Executive explicitly granted to the President by the text of the Constitution. In *Mistretta*, this Court plainly stated that "federal sentencing . . . never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of government." 109 S.Ct. at 650; *see id.* at

Constitution draws a clear line between Article II powers and Article I powers.

B. FACA Impermissibly Limits And Interferes With The Authority Of The President Under The Appointments Clause To Nominate Candidates To The Federal Bench.

1. In areas, such as the appointment process, where the Constitution explicitly delineates the respective roles of the Legislative and Executive Branches (*supra*, 27-28), this Court has not hesitated to strike down statutes that authorize the Congress to exceed its constitutionally defined role.[37] See *Bowsher* v. *Synar*, 478 U.S. 714, 727-36 (1986); *INS* v. *Chadha*, 462 U.S. 919, 956-59 (1983); *Buckley* v. *Valeo*, 424 U.S. at 124-133; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 319; *Myers* v. *United States*, 272 U.S. at 116. In this case, *any* congressional role in the nomination and appointment of federal judges beyond the defined Senate advice and consent power violates the Appointments Clause and is therefore unconstitutional.

2. Even assuming that the Appointments Clause permitted some *de minimis* congressional regulation of the nomination power, it is clear that the interference here is not *de minimis*. There is no question that—at a minimum—the following requirements would have to be met *immediately* upon application of the Act to the ABA Committee:

- Section 8 of the Act would require the Department of Justice to "designate an Advisory Committee Management Officer" for the ABA Committee, who would "chair or attend each meeting of [the ABA] Committee" and who would be empowered "to adjourn any such 'meeting' in the public interest." 5 U.S.C. App. II § 10(e)-(f).
- Section 8 of the Act also would require the Advisory Committee Management Officer to assemble and maintain the reports and records of the ABA Committee and to release those reports to the public under the Freedom of Information Act. *Id.* § 8.[38]
- Section 5(a) would require the Judiciary Committees of the House and the Senate to delve, virtually without restriction, into the operations of the ABA Committee, pursuant to their authority to "review" advisory committee activities and functions.
- Section 7 of the Act would mandate that the Administrator of General Services review the activities of the ABA Committee each year, regardless of whether the President desires that GSA do so. *Id.* § 7(b).[39]
- Section 9 would bar the Committee from meeting or taking any other action until an advisory committee charter is filed with GSA, DOJ, and the House and Senate Judiciary Committees. *Id.* § 9(c).

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664. Similarly, the challenges to the independent counsel provisions of the Ethics in Government Act in *Morrison* did *not* involve any constitutional provisions which explicitly allocated specific powers between the Executive and Legislative Branches.

[37] Appellant WLF argues that the Necessary and Proper Clause authorizes a congressional role in the nomination process. Congress' power under this clause, however, is "inevitably bounded by the express language of Art. II, Sec. 2, cl. 2." *Buckley* v. *Valeo*, 424 U.S. at 138-39.

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[38] Thus, even if—as appellants suggest (Public Citizen Br. 35-37)—exemptions available under FACA (§ 10) could be interposed to prevent the most confidential ABA Committee information and documents from being released *to the public*, such information and documents would have to be released to the DOJ "management officer." Moreover, the decision whether or not to raise (or even litigate) any particular exemption would be in the hands of the Justice Department and not the ABA. This fact alone would severely hamper the ABA Committee's information-gathering process.

[39] While the Act delegates this authority to OMB, the General Services Administration is responsible for the Act's administration. *See* Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

- Section 6(c) of the Act would require the President to make an annual report to Congress on his use of the ABA Committee. *Id.* § 6(c).

While the intrusive regulatory scheme outlined above would have a substantial impact on the necessarily confidential processes of the ABA Commmittee (and thus, on the President's process of nominating federal judges), even more significant interference would result from the potential application of the "public inspection" provisions of Section 10 of the Act. See *supra*, 5. As the district court noted, the ABA Committee's "evaluations of candidates are an integral and important part of the nomination process." J.S. App. 10a. The ABA's investigation of the professional qualifications of prospective nominees to the federal bench is a delicate function and involves confidential interviews with attorneys, judges and law professors in the nominee's community. See J.S. App. 6a, *quoting WLF I*, 648 F. Supp. at 1355. Confidentiality in the process of the ABA Committee's evaluation of prospective judicial nominees is essential to ensure free and honest expression and to the Committee's exercise of its right to freedom of association.[40]

Moreover, "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluative process is confidentiality." J.S. App. 21a. There is, of course, a "valid need for protection of communications between high government officials and those who advise and assist them

in the performance of their manifold duties." *United States* v. *Nixon*, 418 U.S. 683, 705 (1974).[41] Application of FACA to the ABA Committee, and the consequent loss of confidentiality, would seriously jeopardize the ability of the ABA to continue to provide the President with thoroughly considered and candid evaluations of the qualifications of prospective nominees and thereby impair the President's authority under the Appointments Clause.

3. Appellant Public Citizen relies on the fact that the President or the head of an agency may invoke the exemptions of FOIA or the Sunshine Act—where they are applicable—to preserve the confidentiality of ABA Committee meetings or documents. See *supra*, 16.[42] Thus, Public Citizen contends that only "threshold requirements" of FACA need be applied to the ABA Committee's operations. Public Citizen Br. 9; see *supra*, 16 n.12. Appellant WLF also places substantial reliance on the possible use of "exemptions" to suggest that application of FACA would have little or no effect on the ABA Committee's operations. WLF Br. 28 & n.16, 40-41.

The district court resoundingly and correctly rejected the suggestion of appellants that it was "premature" to address the constitutional issues until it could be determined what exemptions were available to the ABA Committee:

> Plaintiffs cannot have it both ways. Plaintiff WLF specifically requests as relief that this Court declare that "all" of FACA's requirements apply to the ABA Committee. Public Citizen's complaint requests

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[40] *See Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979). Confidentiality encourages participation in the evaluation process, protects participants from retribution or harassment and maximizes candor. *See People ex rel. Illinois Judicial Inquiry Bd.* v. *Hartel*, 72 Ill.2d 225, 380 N.E.2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979); *In re Petition of Illinois Judicial Inquiry Bd.*, 128 Ill.App.3d 798, 471 N.E.2d 601 (1984); *Baumgarten* v. *Koch*, 97 Misc.2d 449, 411 N.Y.S.2d 487 (N.Y. 1978); *see also Information Acquisition Corp.* v. *Department of Justice*, 3 GDS ¶¶ 83,149, 83,782-83 (denying disclosure under FOIA of documents collected by FBI on nominee to federal bench because of "strong public interest in candid and thorough investigations of presidential appointments").

[41] Of course, a thorough pre-nomination investigation serves the important function of sparing the President any embarrassment associated with having his nominee rejected by the Senate. *The Federalist* No. 76.

[42] Even appellants do not suggest that the same degree of "confidentiality" could be maintained under FACA as presently exists. While the exemptions cited by appellants might prevent the release of some ABA Committee information and documents to the general public, the Committee's confidential workings would be laid bare to Congress and to the Executive Branch.

> broadly that DOJ be ordered "to comply with FACA's requirements." Although it may be strategically wise to suggest that this Court need not concern itself with the implications of actually applying FACA to the ABA Committee, it is disingenuous to argue that this Court is somehow "not confronted with a concrete case involving the specific application of any of FACA's provisions." It must be presumed that plaintiffs mean what they say in requesting that FACA's few basic requirements be applied to the ABA Committee.

J.S. App. 23a. Appellants are still trying to have it both ways. Either there will be no "concrete" effect (*i.e.*, no disclosure of confidential information that appellants are seeking)—in which case appellants lack standing (see *supra*, 15-17)—or application of FACA will have an adverse impact on the confidentiality of the ABA Committee's review process and, therefore, will infringe the President's ability to rely on the ABA Committee in performing the judicial selection function.[43]

Disclosure and public access are the rule under FACA; the exemptions generally are construed narrowly. See *Nader* v. *Dunlop*, 370 F. Supp. 177, 179 (D.D.C. 1973); *Gates* v. *Schlesinger*, 366 F. Supp. 797, 799 (D.D.C. 1973) ("Congress has expressly determined in the Federal Advisory Committee Act that Advisory Committee reports and functions are *not* generally confidential").[44]

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[43] The brief of WLF, the original plaintiff, states that the "beneficiaries" of laws such as FACA are those "organizations who wish to obtain certain advisory committee documents or attend certain advisory committee meetings, subject to the exemptions from disclosure provided by both FOIA and the Sunshine Act." WLF Br. 4; *see id.* at 23 ("Congress did not intend to exempt personnel matters from the purview of the Act.").

[44] Even if the Department of Justice were authorized, as a general matter, to close the meetings of the ABA Committee, the Department would be required to provide a detailed analysis of the basis for closing the meeting and would also bear the burden of showing that *all* portions of the meeting should be closed. *See Nader* v. *Dunlop*, 370 F. Supp. at 179.

In fact, the Government-in-the Sunshine-Act has *no* deliberative process privilege under which ABA Committee meetings could be closed. See H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25-26, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2244, 2262 (amending FACA to eliminate use of FOIA exemption for internal agency deliberations to close meetings); *Center for Auto Safety* v. *Department Of Justice*, 576 F. Supp. 739, 748 (D.D.C. 1983); Cf. 5 U.S.C. § 552b(c) (FOIA deliberative process privilege).

At bottom, there can be no question that application of FACA will impair the sensitive and necessarily confidential process of gathering information to assess accurately the qualifications and character of prospective judicial nominees. More important, application of FACA will adversely affect the ABA Committee's ability adequately to serve its function of assisting the President in the process of nominating candidates for the federal judiciary. Because the nominating authority is a job assigned exclusively to the President, the President's use of the ABA Committee cannot be undermined by an Act of Congress. Accordingly, this Court must find that the application of FACA to the ABA Committee impermissibly interferes with the President's sole discretion to nominate federal judges and is therefore unconstitutional.[45]

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[45] While the district court correctly held that the application of FACA to the ABA Committee violates the principle of separation of powers, it is not necessary for this Court to reach the issue of whether this congressional intrusion is justified under *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), because FACA as applied clearly contravenes Article II, Section 2 of the Constitution.

IV. APPLICATION OF FACA IN THIS CASE WOULD VIOLATE THE FIRST AMENDMENT.

A. Application Of FACA Would Give Rise To A Direct Infringement Of Rights To Freedom Of Association And Expression.

1. The First Amendment plainly protects the right of association of ABA members. Courts and commentators have long recognized that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).[46] Indeed, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court noted that the First Amendment freedom to speak "could not be vigorously protected from interferences by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622. Therefore, implicit in the right to engage in protected First Amendment activities is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.*; see *Board of Directors of Rotary Club Int'l* v. *Rotary Club of Duarte*, 107 S.Ct. 1940, 1947 (1987).

A statute infringes upon this freedom to engage in group effort when it tries to interfere with the internal structure or affairs of the group, *Cousins* v. *Wigoda*, 419 U.S. 477, 487-88 (1975), or when it attempts to require disclosure of a group's inner workings, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982). This Court in *Roberts* stated:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Id. at 623, *citing Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 234-35 (1977).

In addition to freedom of association, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The free discussion at issue here has two related, but distinct, aspects. First, the ABA Committee members have a clear right, as a group of private citizens, to gather information and confer among themselves and with members of their profession and communities concerning governmental affairs. Second, the ABA Committee and its members have the further, independent right to communicate with representatives of the federal government concerning these same issues. See *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

2. Application of FACA to the ABA Committee would violate these First Amendment interests by inserting the Government into the ABA Committee's consideration and evaluation of prospective nominees to the federal bench. Even accepting *arguendo* appellants' assumption that FOIA and Sunshine Act exemptions would generally protect the ABA Committee's most sensitive conversations and documents from public scrutiny, there is no question that application of the Act would affect the group's "internal structure" (*e.g.*, by interposing a government "Management Officer" in all meetings and correspondence) and mandate disclosure of the Committee's "inner workings" (at *least* to Congress and the Executive Branch). See *Dun & Bradstreet* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n.5 (1985); *Mills* v. *Alabama*, 384 U.S. at 214. See also J.S. App. 21a.

Such governmental intrusion under FACA would plainly affect the way Committee members associate and

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[46] *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

communicate within their intentionally limited and select group. This intrusion even threatens to permit a government official to shape the content of the views of the ABA Committee; indeed, if it chose to do so, the federal government has authority under FACA to adjourn Committee meetings as soon as undesirable views are expressed. 5 U.S.C. App. II § 10(e). Such direct and substantial interference with the rights of association and expression of a private group is virtually without precedent.

Application of FACA to the ABA Committee also would destroy the confidentiality of the Committee's evaluation process and therby chill speech on matters of public concern. A principal purpose of WLF's complaint in this case was to compel disclosure of the statements of persons interviewed by Committee members on a confidential basis. See, e.g., J.A. 6, 8, 10, 15-16. The obvious concern over embarrassment—or even reprisals—against those who express views on prospective nominees (see *Brown* v. *Socialist Workers*, 459 U.S. at 91-93) certainly will chill the free and full expression of opinion on prospective nominees. See *supra*, 36.[47]

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[47] *See, e.g., In re Petition of Illinois Judicial Inquiry Bd.*, 128 Ill. App.3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before"). The courts have long recognized the special sensitivity and need for confidentiality that exist when evaluations of individuals are involved. *See, e.g., Mosk* v. *Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979); *EEOC* v. *University of Notre Dame*, 715 F.2d 331 (7th Cir. 1983) (faculty tenure review); *Zaustinsky* v. *University of California*, 96 F.R.D. 622 (N.D. Cal. 1983) (faculty tenure review); *Bredice* v. *Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1971) (medical review committee).

While appellants have speculated that information concerning potential judicial nominees gathered and discussed by the ABA Committee might not be publicly disclosed if the Government invoked privacy exemptions under FACA or FOIA, the lack of certainty on this point would, at a minimum, chill expressions of candid views concerning potential judicial nominees.

3. Appellants raise several arguments in an effort to avoid the conclusion that application of FACA to the activities of the ABA Committee would infringe the ABA's First Amendment rights.[48] First, WLF argues that in "examining the permissible level of government regulation of the operation of private organizations, the Supreme Court considers to what degree the private organization is 'private.'" WLF Br. 43. WLF thus appears to suggest that the level of judicial scrutiny of infringement of First Amendment rights may be lowered if a private association has some ill-defined "public" characteristics.[49] In a related argument, Public Citizen

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[48] As a threshold matter, appellants contend that the Court should resolve this case without even considering the First Amendment issues because the court below did not have an opportunity to consider those issues. WLF Br. 43; Public Citizen Br. 42. Appellants' argument is meritless. This Court has made clear that a lower court judgment should be affirmed on any available grounds—even those not relied upon by the court below. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-98 (1984); *J.E. Riley Investment Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940). Moreover, the district court did, in fact, have an opportunity to consider the ABA's First Amendment argument in resolving WLF's suit against the ABA. *See WLF I*, 648 F. Supp. at 1356.

Finally, it is well established that this Court can and will address a purely legal issue where to do so would serve the ends of justice. *See, e.g., Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). Neither WLF nor Public Citizen has identified any disputed facts relevant to the First Amendment issue and the record before this Court plainly is sufficient to resolve the First Amendment issue as a matter of law. *See Donovan* v. *Crisostomo*, 689 F.2d 869, 874 (9th Cir. 1982); *National Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 250 (D.C. Cir. 1981); *Federal Election Commission* v. *Lance*, 617 F.2d 365, 374 (5th Cir. 1980).

[49] WLF relies on *Roberts* v. *United States Jaycees*, but *Roberts* provides no support for WLF because this Court clearly applied the "compelling state interest/narrowly drawn" tests without modification in that case. 468 U.S. at 623. Indeed, the suggestion that First Amendment rights diminish along a spectrum moving from "private" to "public" organizations ignores the fact that strict scrutiny may be applied to conduct infringing the First Amendment rights of government employees. *See, e.g., Clark* v.

also suggests that there is no infringement of First Amendment rights because the case involves an instance in which a private association is being "treated more favorably by the government than other members of the public."[50] Public Citizen Br. 43-44. But it is contrary both to existing law and logic to suggest that a private

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Library of Congress, 750 F.2d 89, 94 (D.C. Cir. 1984) (impairment of First Amendment rights of governmental employees justified only by "exacting scrutiny" of government purposes beyond "mere legitimate state interest" and of government means that are "least restrictive of freedom of belief and association"). *See also Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

In *Rouse* v. *Judges of Circuit Court*, 609 F. Supp. 243 (N.D. Ill. 1985), also relied upon by WLF, no First Amendment questions were raised or decided. But, the case is instructive: in *Rouse*, the court found "state action" under 42 U.S.C. § 1983 only when the Bar Association actually *made decisions* for the Circuit Court. The court specifically found no "state action" when the Bar Association merely evaluated or commented on judicial candidates. 609 F. Supp. at 246-47. WLF does not allege—nor could it—that the ABA *makes decisions* for the President about who shall be nominated to the federal judiciary. Thus—assuming that WLF's contorted analogy between FACA and § 1983 is useful—the ABA Committee is *not* functioning as a "government" or "public" entity.

[50] The only case cited by Public Citizen to support this proposition is *Center for Auto Safety* v. *Cox*, 580 F.2d 689 (D.C. Cir. 1978). However, the facts in *Cox* are distinguishable from those here. *Cox* involved an organization, the American Association of State Highway and Transportation Officials ("AASHTO"), which received federal funds and was comprised of government officials, *including* officials of the United States Department of Transportation—the very agency which AASHTO was advising. Thus, in *Cox*, unlike this case, federal government officials were already participating in AASHTO's deliberations. Accordingly, in contrast to this case, no issue of interference with associational rights was or could have been raised in *Cox*. This distinction belies Public Citizen's claim that the restrictions involved in this case are less onerous than those in *Cox*. Public Citizen Br. 44-45. To the contrary, Public Citizen's arguments ignore the substantial infringement on freedom of association that would be entailed in this case—an infringement not even considered in *Cox*.

organization's First Amendment rights are somehow diminished if the government regularly chooses to listen to its views.

Second, Public Citizen argues that "FACA's provisions do not impose any obligations on independent organizations like the ABA" but rather are simply "directed at the government itself." Public Citizen Br. 43. This argument is disingenuous. The fact that the government "enforces" FACA (like any other statute) does not minimize the demonstrated direct intrusions *on the associational rights of a private committee* that a court-ordered and Justice Department-implemented application of FACA necessarily entails. Obviously, when a private association's very ability to meet as a group to discuss public matters is controlled by a federal government employee (see 5 U.S.C. App. II § 10(e)-(f)), it is absurd to claim, as Public Citizen does, that to apply FACA as appellants urge would not impose any burden on a private organization.

Finally, Public Citizen presents a hypothetical which it claims "helps place the ABA Committee's First Amendment argument in context." Public Citizen Br. 44. Public Citizen asserts that this case involves precisely the same issue as would be raised by a case in which the Government refused to listen to the ABA's views unless the ABA adhered to FACA's requirements. *Id.* The issue raised by Public Citizen's hypothetical—whether the ABA would have a First Amendment right to insist that the Government listen to its views without complying with FACA—is plainly distinct from the issue raised by this case.[51]

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[51] This Court has held that cases in which the government's obligation to listen is at issue are not the same as cases—such as this one—involving a party's right to associate for the purpose of addressing "willing listeners." *Minnesota Bd. for Community Colleges* v. *Knight*, 465 U.S. 271, 288-89 n.10 (1984). The First Amendment issue here parallels the one advanced in *Healy* v. *James*, 408 U.S. 169 (1972). There a state university denied a student group access to university facilities to communicate with

This Court need not resolve what the law would be if the ABA Committee were just another group that tries to influence government action. The fact is that the ABA first started giving its views to the Executive Branch in advance of nomination some three and a half decades ago because President Eisenhower and Attorney General Brownell requested it. The arrangement began not at the instance of the ABA, but the Executive Branch. And the process has continued since that time because of the Executive Branch's continuing desire to have the ABA's views in advance of nomination. Obviously, Article II empowers the Executive Branch to seek the views from whomever the President chooses in exercising the appointment power, and that is exactly what has happened in this case. The price to the ABA for responding to a governmental request for information that the ABA is uniquely qualified to supply cannot be the forfeiture of its First Amendment rights of association and speech.

B. The Governmental Interests Served By FACA Cannot Justify The Substantial Infringement Of First Amendment Rights That Would Result From Application Of The Act To The ABA Committee.

To survive judicial scrutiny, a statute directly infringing First Amendment rights of freedom of association and expression—as appellants would apply FACA—must (1) be intended to achieve a compelling governmental interest, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *and* (2) be narrowly drawn to vindicate that interest, *Bellotti*, 435 U.S. at 793-95; *Button*, 371 U.S. at

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willing listeners. This Court rejected the argument that this exclusion did not impair First Amendment rights because the student group remained free to associate in order to advocate its views off-campus (*id.* at 183):

> the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities.

435-38. *Both* of these requirements must be met for an infringing governmental action to be upheld. But FACA, as broadly interpreted by the appellants, satisfies neither of these standards.

Here appellants cannot show any compelling government interest that would even colorably justify application of FACA to the ABA Committee. Congress has no legitimate interest in restricting or shaping the flow of information and views from private groups to the Executive which are vital to the President's exercise of exclusive authority under Article II. Indeed, the Government has not defended the proposed abridgement of the First Amendment rights of the ABA Committee and its members. Instead, in this case two private organizations seek to abridge another private organization's constitutional rights, through an unprecedented application of FACA, even though no evidence indicates that Congress ever intended the Act to be so applied.

WLF asserts in conclusory fashion that any infringement of the ABA's First Amendment rights is justified by Congress' "concern with the need to open up the advisory committee process." WLF Br. 44. This assertion falls far short of passing constitutional muster. WLF has not provided any evidence that Congress identified a national problem with the role of private associations in the presidential nominating process that would justify significant governmental intrusion into the deliberations and operations of such private groups.[32] Obviously, WLF has not—and cannot—cite such a clear statement of compelling interest from a statute which has been described as "obscure, imprecise, and open to interpretations so broad" that litigants "may try to press statutory claims beyond constitutional boundaries." *National Anti-Hunger Coalition* v. *Executive Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. at 530. The complete congressional silence in FACA's legislative history on so fundamental and complex a question as a private association's First Amendment right to participate effectively in the process of nominating presidential appointees cannot constitute the compelling interest required by the First Amendment.

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[32] *Cf. Federal Election Comm'n* v. *Machinists Non-Partisian Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981) (discussing careful scrutiny of congressional purpose this Court accorded phrase "political committee" in Federal Election Campaign Act due to First Amendment implications). In fact, problems with openness and public accountability in the presidential appointment process are unlikely. All groups have notice when vacancies exist, and are thus free to suggest nominees to the President. And all groups are free to engage in debate about the nominee when the Senate exercises its confirmation function.

Indeed, as discussed *supra*, 21-22, the legislative history and, in particular, the conference report underlying FACA demonstrate that Congress intended the Act to apply only to advisory committees created *by* or *for* the government, and not to independent, private organizations from which the Executive Branch seeks advice concerning Presidential appointments. The potential for infringement of the First Amendment rights of private organizations caused by an overly broad application of FACA readily can be eliminated if the scope of the Act is limited as Congress intended.

Finally, FACA, particularly as appellants would apply it, could not be characterized as "narrowly drawn" to vindicate a legitimate government interest. A desire that government officials communicate openly with the public is plainly not sufficient to justify the Government's intrusion into the speech and associational rights of a private group under the broad and vague provisions of FACA. Any legitimate interest in open communications can readily be satisfied by less restrictive means—*i.e.*, by regulating the conduct of government officials and by specifying the communications directly to them that *they* must place in the public record.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEE

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QUESTIONS PRESENTED

In rendering advice to the President, the Attorney General has for more than 35 years regularly sought and received confidental recommendations regarding potential nominees for the federal bench from the American Bar Association Standing Committee on Federal Judiciary (ABA Committee). The Federal Advisory Committee Act (FACA) regulates the operation of advisory committees that are "established or utilized" by the President or Executive Branch officers. The questions presented by these appeals are:

1. Whether appellants have standing to sue the Department of Justice for injunctive relief and to seek a declaratory judgment that the FACA applies in its entirety to the ABA Committee.

2. Whether the FACA applies to the process by which the President obtains advice from the ABA Committee regarding the selection of nominees for the federal bench.

3. Whether application of the FACA to that process unconstitutionally interferes with the President's prerogative under Article II to nominate officers of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-429

PUBLIC CITIZEN, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 88-494

WASHINGTON LEGAL FOUNDATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEE

OPINION BELOW

The opinion of the district court (88-429 J.S. App. 1a-27a (hereafter cited as J.S. App.)) is reported at 691 F. Supp. 483.

JURISDICTION

The judgment of the district court (J.S. App. 28a) was entered on August 4, 1988. A notice of appeal to this Court was filed in No. 88-494 on August 26, 1988 (88-494 J.S. App. 1a-2a), and in No. 88-429 on September 1, 1988 (J.S. App. 29a). The jurisdictional statement in No. 88-429 was docketed on September 9, 1988, and the jurisdictional statement in No. 88-494 was docketed on September 22, 1988. The Court noted probable jurisdiction over both appeals on December 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in an appendix to this brief.

STATEMENT

A. The Process For Selecting Judicial Nominees[1]

The President is responsible for nominating the Justices of the Supreme Court and the judges of the lower federal courts. In deciding on such nominations, the President relies on advice from a federal judicial selection committee composed of several senior officials at the White House and the Department of Justice.[2] As part of the process of advising the President and at the direction of this committee, for the past 36 years the Justice Department has confidentially provided the names of potential nominees for federal judgeships to the ABA Standing Committee on Federal Judiciary (ABA Committee) to obtain the Committee's confidential evaluation of their qualifications.

The ABA Committee is a private entity consisting of 15 members drawn from the approximately 328,000 members of the American Bar Association, which is also a private organization. J.S. App. 4a. The ABA Committee receives no federal funds. *Id.* at 5a. At the Justice Department's request, a potential judicial nominee completes a questionnaire designed by the ABA Committee and submits it to the Assistant Attorney General for the Office of Legal Policy, to the Chair of the ABA Committee, and to the Committee member who represents the

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[1] It is our understanding that, while there may be some minor changes in practice, President Bush will continue the basic nomination process described in this section of our brief.

[2] This committee consists of the Attorney General; the Counsel, Deputy Counsel, and Associate Counsel to the President; two Presidential Assistants; the Director of Presidential Personnel; the Deputy Attorney General; the Counselor to the Attorney General; and the Assistant Attorney General and Deputy Assistant Attorney General for the Office of Legal Policy. J.S. App. 5a.

relevant federal judicial circuit.[3] *Id.* at 5a-6a. Using the answers to this questionnaire, a committee member (ordinarily, the ABA Committee circuit representative) examines the candidate's legal writings and interviews a representative sample of lawyers, judges, and law professors in the candidate's community, as well as members of professional organizations and other groups interested in the nomination process. J.A. 18; J.S. App. 6a; *American Bar Association Standing Committee on Federal Judiciary: What It Is And How It Works* 6 (1983), *reprinted at* J.A. 43-52. During this process, the candidate meets with one or more members of the ABA Committee. The details of this investigation are kept confidential. J.S. App. 6a & n.20. See generally *Washington Legal Foundation* v. *American Bar Association*, 648 F. Supp. 1353, 1354-1355 (D.D.C. 1986), appeal pending, No. 87-7022 (D.C. Cir.) (*WLF I*).

After that investigative process is completed, the ABA Committee representative prepares for the Chair an informal written report, which includes a summary of the candidate's background, a summary of all interviews (including the interview held with the candidate), an evaluation of the candidate's qualifications, and one of four recommendated ratings: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." J.A. 46, 48; see *WLF I*, 648 F. Supp. at 1355. The Chair then provides the Justice Department with an informal evaluation of the candidate, and passes along the substance of the report with a tentative rating, both of which are confidential. *Ibid.*; J.A. 48; J.S. App. 6a. If the Justice Department so requests, a formal report on the candidate is prepared, and the full ABA Committee is polled on the candidate's rating. The Chair then confidentially reports the Committee's final rating to the Justice Department and indicates whether it is unanimous. J.A. 48-49. On some occasions, Justice Department officials discuss with the ABA Committee the initial evaluation and rating. See J.A. 22; *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 3, at 272-275, 290-315 (1984) (hereafter *Confirmation Hearings*). The reasons for the final rating are sometimes revealed to the Justice Department, although the ABA Committee's sources and internal report are not. J.S. App. 6a & n.20; J.A. 48.[4]

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[3] The history of the American Bar Association, its Standing Committee on Federal Judiciary, and the role of both in selection of federal judges are described in J. Grossman, *Lawyers and Judges* 49-81 (1965).

The Attorney General considers the ABA Committee rating, along with other information,[5] in advising the President on selection of judicial nominees. J.A. 20-21; J.S. App. 7a. The Attorney General "serves as a conduit for * * * evaluations [such as that of the ABA Committee] to the President," J.A. 21, and he provides the President with the ABA Committee rating when recommending a candidate for nomination to the federal bench. *Id.* at 22. The President retains complete discretion over whether to nominate any particular candidate. *Id.* at 21. Although Presidents have often decided not to nominate a person who received an unqualified rating from the ABA Committee, in numerous instances the President has nominated such individuals. See *Confirmation Hearings* 322; J. Grossman, *Lawyers and Judges*, 73, 78, 144-153 (1965).

The ABA Committee began its confidential relationship with the Attorney General in 1952, and every President since then has substantially followed the procedure described here. Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 Mass. L.Q. 138, 139-145 (1961); J. Grossman, *supra*, at 69-81.[6] The President has not always adhered to this process when deciding on nominations to this Court, but on several occasions the President has also sought and received the ABA Committee's evaluation on those potential nominees as well. Segal, *supra*, 46 Mass. L.Q. at 143; J. Grossman, *supra*, at 72; J.A. 49-50; 88-429 Response of Appellee WLF to Appellant Public Citizen's Jurisdictional Statement 4.

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[4] If the candidate is subsequently nominated, the ABA Committee rating is publicly disclosed during the Senate confirmation hearings. J.S. App. 7a.

[5] While the ABA Committee investigation is proceeding, a separate investigation of a potential nominee is conducted by the FBI. Information on potential candidates is also gathered through other Justice Department sources. J. Grossman, *supra*, at 92.

[6] For a time, the ABA Committee was furnished the names of several candidates that the President was considering for a particular nomination. Segal, *supra*, 46 Mass. L.Q. at 143.

B. The Federal Advisory Committee Act

"[G]roups created to provide advice and support to our Federal Government have existed since the days of President Washington's Administration." House Comm. on Government Operations, The Role and Effectiveness of Federal Advisory Committees, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 4 (1970), reprinted in Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *Federal Advisory Committee Act—Sourcebook: Legislative History, Texts, and Other Documents* 217 (Comm. Print 1978) (hereafter *FACA Sourcebook*). Although the practice dates back to the beginning of the Republic, the use of non-governmental experts to advise the President on matters of public policy has blossomed in this century. T. Wolanin, *Presidential Advisory Commissions* 5-6, 205-215 (1975). In 1972, Congress decided to regulate these groups and passed the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.* (1982 & Supp. IV 1986) (the FACA), which governs the activities of advisory committees "established or utilized" by Congress, by the President, or by executive agencies. 5 U.S.C. App. 3(2).

For advisory committees established or utilized by the Executive Branch, the FACA requires that timely notice of all committee meetings be given, that meetings be open to the public, and that interested persons be allowed to attend and appear before, or to file statements with, the committee. 5 U.S.C. App. 10(a). Advisory committees must keep detailed minutes of their meetings, and (subject to the exemptions in the Freedom of Information Act (FOIA), 5 U.S.C. 552) must make available, for public inspection and copying, all transcripts of their meetings, as well as all records prepared by or made available to them. 5 U.S.C. App. 10(b) and (c). Any federal agency to which a committee renders advice must also provide the public with the same access to those documents. *Ibid.* Each advisory committee must have a designated federal officer or employee to attend or chair each meeting. That official has the sole power to call or adjourn meetings, and to approve the agenda in advance. No meetings may be held in the absence of that official. 5 U.S.C. App. 10(e) and (f). Each advisory committee also must have a charter on public file. 5 U.S.C. App. 9(c). Committees "establish[ed]" by legislation or "creat[ed]" by the Executive Branch must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 5(b)(2), (c). The President must report to Congress on his reasons for action or inaction on the public recommendations of a Presidential advisory committee. 5 U.S.C. App. 6(b). Finally, any advisory committee in existence when the FACA became effective was required to terminate within two years of that date. 5 U.S.C. App. 14(a).

As originally enacted, the FACA provided that the President or head of the responsible federal agency could close an advisory committee meeting to the public on the basis of the exemptions in the FOIA, including the exemption protecting the deliberative process, 5 U.S.C. 552(b)(5). 5 U.S.C. App. 10(d) (Supp. IV 1974). See *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101, 106-108 (D.C. Cir. 1976). In 1976, however, when it passed the Government in the Sunshine Act, 5 U.S.C. 552b, Congress deleted the deliberative process exemption as a ground for closing a committee meeting to the public and amended the FACA so that advisory committee meetings can now be closed only on the basis of the more limited exemptions contained in the Sunshine Act. 5 U.S.C. App. 10(d); S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. 25-26 (1976). The disclosure of advisory committee records remains subject to the FOIA exemptions. 5 U.S.C. App. 10(b).[7]

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[7] At least one court, however, has held that the FOIA exemption for deliberative process material is not available to protect against disclosure of advisory committee records. *Wolfe* v. *Weinberger*, 403 F. Supp. 238, 242-243 (D.D.C. 1975).

Since 1974, the Attorney General has formally taken the position that the ABA Committee is not governed by the FACA. Accordingly, neither the Department of Justice nor the ABA Committee has followed the Act's requirements in connection with the process of advising the President on potential nominees for the federal branch.

C. The Litigation Below

In December 1985, appellant Washington Legal Foundation (WLF) filed an action in the United States District Court for the District of Columbia against appellee American Bar Association, the ABA Committee, and various private individuals, alleging that the ABA Committee is covered by the FACA and must comply with its mandates. The district court dismissed that suit, ruling that the FACA does not supply private persons with a cause of action against a private entity not established or financed by the federal government. *WLF I*, 648 F. Supp. at 1359-1361.

Shortly before that dismissal, appellant WLF brought this action in the same court against appellee Department of Justice, and appellant Public Citizen subsequently intervened. Both parties asserted that the FACA governs the ABA Committee and that the court should order the Department to comply with the FACA when it seeks the Committee's advice. J.A. 11, 26. Appellant WLF also sought access to the records of the ABA Committee from the Justice Department. *Id.* at 11. The Justice Department argued that (1) the FACA does not apply to the ABA Committee, and (2) if it did, the Act would unconstitutionally interfere with the President's ability to obtain the advice necessary to decide whether to nominate an individual to the federal bench.[8]

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[8] Both before and after the district court entered judgment, the Department of Justice informed Congress of the two arguments the Department intended to present in the case.

The district court dismissed the action. J.S. App. 27a, 28a. On the first question, the court agreed with appellants that the ABA Committee is an "advisory committee" under the FACA and therefore is subject to its requirements. *Id.* at 7a-14a. The court ruled that the FACA's definition of an "advisory committee" includes the ABA Committee, because it is "utilized" by the Department through institutional arrangements as a preferred source of advice. The legislative history of the Act, the court said, shows that its text should be given an expansive construction. *Id.* at 7a-9a.

On the second question, the court agreed with the Department of Justice that application of the FACA to the ABA Committee would unconstitutionally interfere with the President's ability to obtain advice about whether to nominate a person for the federal bench. J.S. App. 15a-26a. The court determined that Article II vests in the President the authority to nominate officers of the United States, and that FACA intruded on the President's textually assigned nomination power. J.S. App. 15a-26a. The proper role for the Legislative Branch in this process, a role also set out in Article II, is the advise and consent function entrusted to the Senate. J.S. App. 16a-19a. Finding that the "hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality," *id.* at 21a, the court held that the FACA was likely to disrupt significantly the selection of judicial nominees. *Id.* at 20a-25a. At the same time, the court held that the purpose of the FACA – assuring public accountability – is already served by the Senate confirmation process. *Id.* at 25-26a. On the basis of this analysis of the proper interests and concerns of the legislative and executive branches, the court concluded that application of the FACA to the President's nomination of federal judges violates separation of powers principles. *Id.* at 26a-27a.[9]

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[9] Appellee American Bar Association intervened in this case after the district court entered judgment. J.A. 3.

SUMMARY OF ARGUMENT

1. For two reasons, this case is considerably narrower than appellants contend. First, standing to bring this action exists only with regard to the denial of WLF's requests for access to the ABA Committee's records and meetings. Only as to those claims has either appellant alleged the personal injury in fact that is a prerequisite to suit. In all other respects, appellants have, at best, no more than a generalized complaint shared by all members of the public that the law, as they understand it, is not being enforced.

Second, many provisions of the FACA are inapplicable to the functioning of the ABA Committee. Since the Committee is not one "established" by the federal government but, at most, is one "utilized" by the President for certain limited purposes, none of the provisions directed only to the first of these categories is properly in issue here.

2. As a matter of statutory construction, the FACA is wholly inapplicable to the President's reliance on the ABA Committee because he does not "utilize" the services of that Committee within the meaning of the Act. Although the dictionary definition of that term might be broad enough to encompass the work of the Committee, the Act must be construed in the light of the specific objectives of Congress and in a manner that will, if reasonably possible, avoid substantial constitutional problems. So read, the Act should be held not to apply to the President's reliance on private organizations for advice in the exercise of his Article II prerogative to nominate officers of the United States.

The two fundamental purposes of the FACA, as shown by both its text and its history, are (a) to eliminate the inefficient use of federal funds resulting from the proliferation of advisory committees, and (b) to minimize the risk that special interest groups will exercise undue influence on the implementation of legislative policy. Neither of these purposes is relevant to the work of the ABA Committee, and indeed the legislative history is devoid of any congressional concern either with the work of that Committee or with *any* resort to private persons or groups in connection with the nomination process. Such matters are not, and were not thought to be, appropriate for legislative oversight.

Under these circumstances, the FACA should be read to avoid a constitutionally suspect outcome; when the President, without expenditure of public funds, relies on a private group for advice with respect to the exercise of a power expressly and exclusively vested in him by Article II, he has not "utilized" the services of that group under the FACA. Such reliance would include resort to private groups for advice with respect to the exercise of the nomination, pardon, and veto powers—all clearly distinguishable from resort to private groups for advice with respect to the implementation of legislative policy.

3. If the FACA were to apply to the President's reliance on the advice of the ABA Committee, the Act would unconstitutionally interfere with the exercise of his power under Article II to nominate officers of the United States. Both the words and the actions of the Framers and the early leaders of the Republic leave no doubt that the nomination function was vested in the sole discretion of the President. Only such undivided authority could assure undivided responsibility for the quality and integrity of those nominated for high office. The exclusive check on that authority—the means by which the President's choice is to be subject to public scrutiny and review—is the power of the Senate to advise and consent.

Since the beginning of the Republic, Presidents have found the advice of private citizens and groups to be an essential aspect of the nomination process, and have consistently stressed the need for confidentiality in that process. Application of the FACA to the President's efforts to obtain the best and most reliable counsel could substantially reduce the value of that advice, and indeed could wholly dry up sources of assistance essential to proper performance of the President's role. To the extent that such considerations are relevant, no countervailing public or congressional interest warrants this intrusion into an exclusive function of the President.

ARGUMENT

I. THE ONLY PROVISIONS OF THE FACA AT ISSUE IN THIS CASE ARE THOSE SECTIONS REQUIRING THE GOVERNMENT TO PROVIDE THE PUBLIC WITH ACCESS TO THE RECORDS AND MEETINGS OF ADVISORY COMMITTEES

In the district court, appellants sought broad declaratory and injunctive relief against the Department of Justice, forbidding the Department from obtaining the ABA Committee's advice in the judicial nomination process until the Department satisfied all the requirements of the FACA. J.A. 11, 26. In fact, however, this case involves far less than appellants contend, for two reasons. First, the only claims appellants have standing to assert are claims of access to the ABA Committee's records and meetings. Second, by their own terms, certain provisions of the FACA do not apply to an advisory group that, like the ABA Committee, is not created by the executive.

A. Appellants Have Standing Only To Request Access To The ABA Committee's Records And Meetings

To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and that is likely to be redressed by the relief sought. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The alleged injury must be "distinct and palpable," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), and must give rise to a personal stake in the outcome of a case; it is not sufficient merely to state a "generalized grievance[] about the conduct of government or the allocation of power in the Federal System." *United States* v. *Richardson*, 418 U.S. 166, 173 (1974). A party must establish standing to sue with respect to each claim that he asserts; the standing to raise one claim does not by itself entitle a plaintiff to seek redress for others.

Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 722 (1985); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

Both appellants lack standing to challenge the Department's alleged noncompliance with most of the FACA's requirements. Appellant WLF can raise only two limited claims – the denial of access to the records of the ABA Committee, and WLF's inability to attend and to appear at meetings of the ABA Committee.[10] As to all other provisions of the FACA, appellants cannot show the "distinct and palpable" personal injury necessary for standing and can assert nothing more than a generalized and abstract grievance.[11]

In its complaint, appellant WLF generally alleged that it "has suffered and continues to suffer a legal wrong or is adverely affected and aggrieved by the defendant DOJ's utilization of the ABA Committee as an advisory committee in violation of FACA," J.A. 9. WLF also claimed that the ABA Committee has consulted with "selected liberal political organizations or their representatives," *id.* at 7, that the ABA Committee "has investigated and continues to investigate the judicial candidate's political and ideological philosophy in cooperation with [such] groups," *ibid.*, that the Committee's investigations "have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President," *ibid.*, and that if the Committee's advice "indicates that the candidate is not considered qualified to be a judge by the ABA Committee or is otherwise viewed as unfavorable, the DOJ relies on that advice by removing the candidate's name from further consideration." *Ibid.* In essence, therefore, WLF alleged that the ABA Committee pursued its advisory function in a manner that harmed potential judicial nominees with conservative views. WLF's specific claims of injury to itself, however, were considerably more narrow.

WLF alleged that it "seeks to attend and observe these meetings [of the Committee]," and that "the ABA Committee has failed and continues to fail to furnish the [WLF] and public with notice of its meetings and to open them to the [WLF] and public." J.A. 9-10. WLF also alleged that it had "requested information from the ABA Committee" and that its request "was denied." *Id.* at 6, 10-11. See *id.* at 13-19 (correspondence between WLF and the ABA Committee). Three types of information were sought: (a) "the names of all those federal judicial candidates being reviewed by the Committee," *id.* at 8; *id.* at 14 ("the names of persons whom [*sic*] your committee has been informed are under consideration for federal judicial appointments," and "the list of all names currently under review by your committee, and all future such lists"); (b) "the reports and minutes of all meetings of the Committee held during the last two years where judicial candidates were discussed and considered," as well as information about "the date and place of all future meetings," *id.* at 8, 14, 15; and (c) "any and all reports, memoranda, or other documents relating to the Committee's evaluation of Professor Lino Graglia," *id.* at 8, 16. Finally, WLF alleged that "[n]o advisory committee charter for the ABA Committee has been filed," *id.* at 10, but WLF did not claim any particular injury from that alleged irregularity.

The complaint in intervention filed by appellant Public Citizen is even more sparse. It alleged only that, J.A. 26:

> Public Citizen wishes to gain access to more information regarding the ABA Committee, including the role assigned to the Committee by the Justice Department and the

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[10] Because in our view appellant WLF has standing to seek access to the ABA Committee's records and meetings, we believe it is unnecessary to decide whether Public Citizen independently has standing to raise those same claims. See *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 402-403 n.22 (1982). We doubt that it does have such standing, however, even under a generous reading of its complaint.

[11] The government did not move in district court to dismiss the other claims raised by appellants because the district court had ruled in the earlier lawsuit that appellant WLF had standing to raise those claims. *WLF I*, 648 F. Supp. at 1357-1358.

> general criteria and procedures used by the Committee in evaluating possible judicial nominees, but such information is not currently available to Public Citizen because the Justice Department is not complying with the FACA.

The accompanying affidavit submitted by the president of Public Citizen, J.A. 28-30, added nothing to Public Citizen's claim of injury. It stated only that the organization sought to intervene in this case because acceptance of the government's argument that the FACA cannot constitutionally be applied to the ABA Committee "would have a serious, detrimental impact on the public's right of access to, and input into, the operation of federal advisory committees." *Id.* at 30. The affidavit also stated that Public Citizen has a "significant interest in the federal judiciary," because it "regularly resorts to the federal courts to further the interests of its members," and "[t]hus, the criteria and methods used to select federal judges have far-reaching effects on Public Citizen's work." *Ibid.*

Thus, while appellants' complaints assert that the Department of Justice has not complied with any of the requirements of the FACA, appellant WLF alleged only two injuries personal to it: a denial of access to the records and minutes of the ABA Committee, and a denial of access to the Committee's meetings. We believe those allegations are sufficient to establish appellant WLF's standing to raise those claims. But neither appellant has standing to complain that the Department of Justice and the ABA Committee have not followed any other requirements of that law. Thus, appellants lack standing to assert, for example, that the ABA Committee does not have a balanced membership or a charter, that it meets outside the presence of a federal official or without an agenda approved by him in advance, and that the ABA Committee was not terminated within two years of the effective date of the FACA. Similarly, appellants cannot challenge the President's failure to report to Congress if he does not follow the ABA Committee's recommendations.[12]

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[12] Two district court decisions appear to have ruled that a plaintiff can establish standing to assert a claim under the balanced membership and other provisions of FACA Section 5 simply by establishing standing to raise a claim

Appellants' other claims—such as WLF's claim that the ABA Committee is biased against conservative nominees, or Public Citizen's claim that it is interested in the members of the federal bench—do not state any injury to either appellant that could not also be alleged by any other member of the public. Appellants have not alleged that any member of their organizations would have been nominated for the federal bench had the ABA Committee not been rendering confidential advice to the President. Appellants cannot allege that they have any greater stake in the operation or outcome of the nomination process than any other individual citizen or organization. And appellants' claim that the government has violated the FACA does not, without more, establish their standing to seek relief directing the Department to comply with the Act's requirements in their entirety. *Allen* v. *Wright*, 468 U.S. at 754-755 (collecting cases); *Ex parte Levitt*, 302 U.S. 633 (1937); *Mulqueeny* v. *National Commission on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1122 (7th Cir. 1977) (applying that principle to a suit brought under the FACA).[13] Lacking any true injury,

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under the records access and open meetings provisions of FACA Section 10. *WLF I*, 648 F. Supp. at 1357-1358; *National Anti-Hunger Coalition* v. *Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 527 (D.D.C. 1983), aff'd on other grounds, 711 F.2d 1071 (D.C. Cir. 1983). The District of Columbia Circuit has indicated in dicta that it agrees with that view. *National Anti-Hunger Coalition*, 711 F.2d at 1073-1074 & n.2. That conclusion, in our view, is wrong. A plaintiff must independently establish his standing to assert each claim set forth in his complaint. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 722; *Warth* v. *Seldin*, 422 U.S. at 498.

An additional difficulty with the balanced membership provision of FACA Section 5 is that it establishes no clear standard for a reviewing court to use to assess whether a particular advisory committee is balanced. See Note, *The Federal Advisory Committee Act*, 10 Harv. J. Legis, 217, 229 (1973). This requirement, therefore may not be judicially enforceable under the Administrative Procedure Act, 5 U.S.C. 551. See *Heckler* v. *Chaney*, 470 U.S. 821, 833 (1985).

[13] Even if they could show a special interest in the appointment process, appellants would likely lack standing to challenge aspects of the process, since

appellants' broadly stated claims seek to have this Court act as a "publicly funded forum[] for the ventilation of public grievances," *Valley Forge,* 454 U.S. at 473. See also *Sierra Club* v. *Morton,* 405 U.S. 727, 739-740 (1972) (despite Sierra Club's longstanding "commitment to the cause" at issue, Club lacked standing to object to development program because of failure to allege sufficient injury in fact).[14]

B. Provisions Of The FACA Governing The "Establish[ment]" Of An Advisory Committee Are Not Applicable To The President's Reliance On The Advice Of A Private Entity Like The ABA Committee

Although the FACA is generally applicable to advisory committees "established or utilized" by the President or an executive

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the Senate must consent to the President's nominees before they can become judges. See *Allen* v. *Wright,* 468 U.S. at 757-761, and *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-43 (1976) (no standing where alleged injury depends on the actions of an independent third party).

[14] The importance of closely scrutinizing the claims of injury set forth in appellants' complaint is underscored by the fact that unlike the FOIA, 5 U.S.C. 552(a)(4)(B), and the Sunshine Act, 5 U.S.C. 552b(h), the FACA does not supply private parties with a private right of action to enforce that Act's mandates. That omission was no oversight. Several earlier versions of the legislation ultimately enacted as the FACA contained provisions that would have created a private cause of action, but none of those provisions was adopted by Congress in the statute. See S. Rep. No. 1098, 92d Cong., 2d Sess. 16 (1972); S. 2064, § 14, 117 Cong. Rec. 19,805 (June 15, 1971); S. 1637, § 11, 117 Cong. Rec. 11,444 (Apr. 22, 1971); *FACA Sourcebook* at 135, 150. And in 1977 Congress declined to amend the FACA to add a private right of action. See 123 Cong. Rec. 22,802 (July 13, 1977); *FACA Sourcebook* at 370-371 (reprinting text of proposed bill). See *Mulqueeny,* 549 F.2d at 1120 n.15 ("the legislative history of * * * the [FACA does not] manifest[] an intent, either express or implied, to create a right of enforcement in private citizens."). Accordingly, if appellants have any remedy in this case, it can be based only on the APA and would require a clear showing of injury in fact. *Mulqueeny,* 549 F.2d at 1120-1122.

branch agency, 5 U.S.C. App. 3(2), several of its provisions apply only to advisory committees that are "established," rather than "utilized," by the government. For example, Section 5(b) states that "legislation establishing, or authorizing the establishment of any advisory committee" shall "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 5(b)(2). The Executive Branch must also follow that requirement "in creating an advisory committee." 5 U.S.C. App. 5(c). The FACA also requires that particular notice and justification be given before the head of a federal agency establishes an advisory committee. 5 U.S.C. App. 9(a). See also 5 U.S.C. App. 8(b) (an agency officer shall exercise control over the procedures and accomplishments of committees "established by that agency").

Those requirements are not applicable in this case. The ABA Committee is a purely private organization that was in existence long before it came to be used by the President for advice in the nomination process. *WLF I,* 648 F. Supp. at 1354-1355; J.S. App. 18a; J.A. 21; J. Grossman, *supra*, at 62-69. Thus, it cannot be deemed to have been "established" or "created" by the government in any sense of those terms.[15] Indeed, the district court noted that "there is no contention here that the ABA Committee was established by the President or a federal agency," J.S. App. 8a, and appellants make no such claim in this Court. See Public Citizen Br. 16 ("the ABA Committee was not 'established' by the Justice Department"); WLF Br. 13 ("the ABA Committee constitutes an advisory committee under the [FACA] because it is utilized by the Department of Justice").

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[15] See *Physicians' Education Network, Inc.* v. *HEW,* 653 F.2d 621, 622 (D.C. Cir. 1981) (the balanced membership requirement is inapplicable to a committee that is not established by statute or pursuant to statutory authority); *Metcalf* v. *National Petroluem Council,* 553 F.2d 176, 178 (D.C. Cir. 1977) (specifying the ways that an advisory committee can be "established"); *Consumers Union of United States, Inc.* v. *HEW,* 409 F. Supp. 473, 477 n.6 (D.D.C. 1976), aff'd, 551 F.2d 466 (D.C. Cir. 1977); *Lombardo* v. *Handler,* 397 F. Supp. 792, 796-797 (D.D.C. 1975), aff'd mem., 546 F.2d 1043 (D.C. Cir. 1976) (Table), cert. denied, 431 U.S. 932 (1977).

Because, as the district court explained, the FACA can apply to the ABA Committee (if at all) only because it is "utilized" by the President, J.S. App. 8a, the FACA requirements that pertain only to advisory committees "establish[ed]" or "creat[ed]" by the executive are not before the Court at this stage of the case.[16]

II. THE FACA DOES NOT APPLY TO THE PRESIDENT'S RELIANCE ON PRIVATE ORGANIZATIONS FOR ADVICE IN THE EXERCISE OF HIS ARTICLE II PREROGATIVE TO NOMINATE "OFFICERS OF THE UNITED STATES"[17]

A. The Dictionary Meanings Of the Term "Utilized" In The FACA Do Not Furnish The Answer To This Case

Appellants' parallel arguments that the FACA applies to the ABA Committee proceed in four steps. See WLF Br. 15-26; Public Citizen Br. 15-22. First, appellants point out that Section 3(2) of the FACA defines an "advisory committee" as "any committee" that is "utilized by the President" or "by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 3(2). Second, they contend that the ABA Committee is a "committee" for purposes of the Act. Third, appellants submit that, since Congress did not define the term "utilize" in the FACA, that term should be given its dictionary meaning of "to make use of." J.S. App. 8a. Because the President and Department of Justice "make use of" the ABA Committee's evaluation of a candidate for the federal bench, the Committee is said to be an "advisory committee" under the FACA. Finally, appellants contend that this conclusion is consistent with the implementing regulations adopted by the General Services Administration, which define an "advisory committee" as a committee that the Executive Branch adopts "as a preferred source" of advice, 41 C.F.R. 101-6.1003 (1987), and with the committee reports on the FACA, which state that the "advisory committee" should be interpreted broadly, S. Rep. No. 1098, 92d Cong., 2d Sess. 6, 8 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972).

We agree that the FACA's definition of an "advisory committees" is broadly worded. But it is precisely that breadth that has troubled the lower courts, which have recognized that a sweeping, literalistic application of its terms could have a stifling effect on the ability of the executive to conduct its affairs, and could therefore raise serious structural and even constitutional problems.[18] The principal difficulty is two-fold. First, the entities covered by the term "advisory committee"—*i.e.*, "any committee, board, commission, council conference, panel, task force, or other similar group," 5 U.S.C. App. 3(2)—could embrace virtually any formal group (and perhaps some informal ones as well) of two or more persons. Second, the verbs "established" and "utilized" are written in the disjunctive and are not expressly defined. The verb "established" can generally be understood from other provisions in the FACA to refer to committees that the government has itself brought into being. See 5 U.S.C. App. 5(b) (referring to "*legislation* establishing, or authorizing the establishment of any advisory committee") (emphasis added) and 5(c) (referring to advisory committees "*creat[ed]*" by the executive). But the Act does not supply a similar limiting principle to guide the interpretation of the verb "utilized," and simply to give that term its dictionary meaning of "make use of" would invest it with an astonishing reach.

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[16] As explained below, however, that requirement might come into play if the FACA were held to apply to the ABA Committee, and the government thereafter terminated and then revived its reliance on the Committee.

[17] If the Court agrees with our argument in Point I, the question in Point II is limited to the applicability of the records access and open meeting provisions of the FACA.

[18] As the court observed in *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F. Supp. 524, 530 (D.D.C.), aff'd, 711 F.2d 1071 (D.C. Cir. 1983), the FACA is "obscure, imprecise, and open to interpretations so broad that * * * it would threaten to impinge unduly upon the prerogatives preserved by the separation of powers doctrine." See also *Nader* v. *Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975) ("the Act contains a very broad, imprecise definition, and in this respect is not a model of draftsmanship"), vacated as moot, No. 75-1969 (D.C. Cir. Jan. 10, 1977). See *NRDC* v. *Herrington*, 637 F. Supp. 116, 118-121 (D.D.C. 1986); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 223 (D.D.C. 1976), aff'd in part, rev'd in part, and remanded, 580 F.2d 689 (D.C. Cir. 1978); *Lombardo* v. *Handler*, 397 F. Supp. 792, 800 (D.D.C. 1975), aff'd, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977).

This case illustrates the dramatic effect on the operation of the government that would result from treating the President's reliance on the ABA Committee's evaluation of a potential nominee's qualifications as the "utilization" of an advisory committee. If applicable to the ABA Committee, the FACA would have a significant and pervasive impact on the way that the ABA Committee supplies the President with advice. First, it appears that the ABA Committee must "terminate" immediately, or at least the President's use of it must terminate, since all advisory committees existing when the FACA was enacted in 1972 were required to cease operating within two years. 5 U.S.C. App. 14(a). The ABA Committee's role could be renewed by the President or the Attorney General, but only pursuant to the procedures set out in the Act, and if this action constituted an "establish[ment]," the Committee might then be subject to such provisions as the "fairly balanced" membership requirement of 5 U.S.C. App. 5(b)(2). See 5 U.S.C. App. 5(c).

Even though the ABA Committee is a private organization, it would be required to have a charter, 5 U.S.C. App. 9(c), and a federal official to control and supervise its operations, 5 U.S.C. App. 8(b). That official must chair or at least attend each meeting of the ABA Committee, and would have the power to call, approve, and adjourn any and all such meetings. 5 U.S.C. App. 10(e) and (f). Moreover, the ABA Committee would need to keep minutes of its meetings, all of which would be open to the public, unless the President or the Attorney General determined in writing that the meetings could be closed pursuant to specified exemptions in the Sunshine Act. 5 U.S.C. App. 10(a) and (d). The minutes and all records of the ABA Committee would be open to public inspection and copying unless the FOIA exemptions applied to specific material. 5 U.S.C. App. 10(b). If the ABA Committee's recommendations to the President are public, the President would then have to submit reports to Congress explaining why he had disregarded the ABA Committee's advice regarding particular candidates for the bench. 5 U.S.C. App. 6(b). In sum, the FACA would completely alter the face and operation of the ABA Committee, and place it under the direct control and supervision of the Attorney General. Even if the President were willing to operate on this basis, it seems highly unlikely that the ABA Committee would accept such constraints. See ABA Br. Point III. B. 2.

Moreover, if applied literally, the FACA could be read to regulate the President's ability to consult with a legion of other groups that are interested in the nomination process. For example, giving the term "utilized" its dictionary meaning would require compliance when the President consults with organized labor groups, such as the AFL-CIO, before nominating a Secretary of Labor, when the President consults with civil rights organizations, such as the NAACP, before nominating Commissioners of the EEOC, and perhaps even when the President consults with his own national political party before nominating other officers of the federal government.

This case, therefore, cannot properly be disposed of by resort to the dictionary. The term "utilized" may be simple and straightforward, but so is the phrase "sleeping in the railway station is prohibited" in a local ordinance. Just as a court may legitimately inquire whether a passenger who falls asleep while waiting for his train has committed a misdemeanor within the meaning of that phrase,[19] so too a court may inquire whether the President "utilizes" an advisory committee within the meaning of the FACA when he seeks the opinion of a wholly private organization about the qualifications of a person before deciding whether to nominate that person for federal office. The reason is that in both cases the dictionary meaning of the terms "yields results so manifestly unreasonable that they could not fairly be attributed to [legislative] design," *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979).

The "plain-meaning" rule invoked by appellants is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.). This Court has stated on a number of occasions that the circumstances of the enactment of a particular law may show that Congress did not intend that words of common meaning would have their literal effect. See, *e.g.*, *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986); *Watt* v. *Alaska*, 451 U.S. 259, 267-273 (1981). For instance, in *O'Connor* v. *United States*, 479 U.S. 27 (1986), this Court held that a treaty exempting Panama Canal Commission employees from "*any* taxes * * * on income received as a result of their work for the Commission" did not exempt them from federal income taxation.[20] Such an approach is particularly appropriate in this case, where a literalistic construction of the statute would raise serious constitutional questions that can be avoided by reading the Act in a manner that is not "clearly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988). See also, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 73 (1982).

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[19] The example is taken from Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 664 (1958).

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[20] There are many other examples. See, *e.g.*, *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (the term "employees of motor carriers," as used in the Motor Carrier Act, refers only to employees in safety-related jobs and not to all employees; "even when the plain meaning did not produce absurd results but merely an unreasonable one * * * this Court has followed [the legislative] purpose, rather than the literal words"); *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987) (holding that a statute providing that pregnant women "shall be treated the *same* [as other persons] for all employment-related purposes," 42 U.S.C. 2000e(k) (emphasis added), does not forbid special leave and reinstatement allowances); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975) (refusing to treat "stock" in a cooperative housing project as a "security" for purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934, even though both statutes' definitions of "security" include the term "stock"); *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 109 S.Ct. 278, 281-282 (1988) (provision of federal statute that made "State taxation laws" inapplicable to the outer Continental Shelf does not prevent a State from including income earned from sale of outer shelf oil and gas in its apportionment formula). See generally *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. at 284 ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.") (citations and internal quotation marks omitted).

B. The Term "Utilized" Should Be Construed In Light Of The Purposes and Policies Of The FACA

In our view, the term "utilized" should be read in light of the two fundamental purposes of the FACA: (1) to eliminate the inefficient use of federal funds that resulted from underwriting the work of advisory committees whose reports were of little value to federal policymakers, and (2) to minimize the risk that special interest groups would influence or direct the implementation of congressional policy in a manner at odds with the public interest. See, *e.g.*, S. Rep. No. 1098, *supra*, at 1, 3, 4-5, 16; H.R. Rep. No. 1017, *supra*, at 6, 8, 10; *NRDC* v. *Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986); *Consumers Union of United States, Inc.* v. *HEW*, 409 F. Supp. 473, 475 (D.D.C. 1976), aff'd, 551 F.2d 466 (D.C. Cir. 1977). Those objectives are reflected on the face of the statute itself. 5 U.S.C. App. 2(b). Accordingly, two important criteria for determining whether a particular body is "utilized" for purposes of the FACA are whether the entity receives federal funds and whether the use being made of the body relates to the exercise of statutory authority delegated by Congress to implement federal law.

1. The FACA was the culmination of 15 years of intermittent effort by Congress to regulate the government's use of "advisory committees," *i.e.*, bodies consisting in whole or in part of private persons enlisted by the government to provide information, technical expertise, or collective advice and recommendations on issues of public policy.[21] Although the practice of cre-

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[21] In 1950, concern that the creation of federal advisory committees could foster anticompetitive conduct by industry leaders, H.R. Rep. No. 576, 85th Cong., 1st Sess. 3 (1957); *FACA Sourcebook* 3-4, 46; Note, *The Federal Advisory Committee Act*, 10 Harv. J. Legis. 217, 220 (1973), led the Justice Department to issue guidelines governing the operation of those committees. See *WOC's [Without Compensation Government Employees] and Government Advisory Groups, Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. Pt. 1, at 586-587 (1955) (reprinting guidelines). The guidelines resembled several of the requirements later imposed by the FACA, see Note, *supra*, 10 Harv. J. Legis. at 220 n.18, and specifically sought to minimize the risk of antitrust violations by ensuring

ating and using executive advisory committees existed for our entire history, over time that practice was sharply criticized on several grounds.[22] Those criticisms and the failure of the executive to police this practice itself ultimately persuaded Congress that congressional regulation of advisory committees was necesssary, for three reasons.

First, Congress found that, although the number of advisory committees had greatly proliferated, the committees were often inefficient, or a complete waste of federal funds.[23] Many committee reports and recommendations received little if any consideration by the President, his staff, or other executive officials,[24] and numerous committees had been created to undertake assignments already completed by a predecessor.[25] In addition, many such committees were created simply because of the inclination, whenever a problem or emergency arose, "to create a commission to study and advise on the problem," and then to use the committee's existence as an excuse to delay resolving it.[26]

Second, Congress became concerned with a phenomenon colloquially known as "agency capture," *i.e.*, the risk that special interest groups who work closely, and behind closed doors, with regulatory agencies will be able to exert an improper influence over the implementation of congressional policy by those agen-

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that advisory committees were established only at the government's initiative and that the government would supervise their operation.

In 1957, after the House Committee on Government Operations found that the Department's guidelines were often ignored, see Note, *supra*, 10 Harv. J. Legis. at 220, Representative Fascell sponsored a bill that would have incorporated the Department's guidelines into law. H.R. 7390, 85th Cong., 1st Sess. (1957). The bill would have required agencies to report to Congress about their use of advisory committees, and advisory committees to follow guidelines like those issued by the Justice Department, see H.R. Rep. No. 576, *supra*, at 2, 5-7 (describing the provisions of the bill), but would not have imposed any requirements on wholly private organizations whose advice was sought by the executive. See 103 Cong. Rec. 11,252 (1957) (remarks of Rep. Fascell and Rep. Vorys).

The bill was not enacted, but two years later, the Bureau of the Budget issued a directive on advisory committees that essentially incorporated its guidelines. Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 Geo. L.J. 725, 731 (1975); Note, *supra*, 10 Harv. J. Legis. at 221. In 1962, President Kennedy issued an executive order, Exec. Order No. 11,007, 3 C.F.R. 573 (1959-1963 Comp.), 27 Fed. Reg. 1875 (1962); *FACA Sourcebook* 238-241, providing new regulations for the formation and use of an advisory committee, other than a Presidential advisory committee, that was "formed" by an executive department or agency, or that was "not formed by a department or agency, but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee." Exec. Order No. 11,007, § 2(a). The purpose of the order was to ensure that advisory committees were used in compliance with the antitrust and conflict of interest laws, *id.* para. 3, and to that end, the order distinguished between general advisory committees and industry advisory committees, imposing stricter standards on the latter. The order provided that in the case of a nonindustry advisory committee, an agency could waive many of the order's provisions if it determined that compliance "would interfere with the proper functioning of such a committee or would be impracticable, that adequate provisions are otherwise made to insure that committee operation is subject to Government control and purpose, and that waiver of the requirement is in the public interest." *Id.* § 6(f).

Congress returned to this subject in the early 1970s when the House and Senate Government Operations Committees held hearings on advisory committees. See Perritt & Wilkinson, *supra*, 63 Geo. L.J. at 733; Note, *supra*, 10 Harv. J. Legis. at 222-224. As a result of the hearings, Congress determined that statutory regulation of advisory committees was necessary for the reasons explained in the text.

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[22] See generally S. Rep. No. 1098, *supra*, at 1, 3, 4-5, 16; H.R. Rep. No. 1017, *supra*, at 6, 8, 10; House Comm. on Government Operations, The Role and Effectiveness of Federal Advisory Committees, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 1-23 (1970); *FACA Sourcebook* 214-237; H.R. Rep. No. 576, *supra*, at 1-5; *FACA Sourcebook* 44-48; Perritt & Wilkinson, *supra*, 63 Geo. L.J. at 731-734; Note, *supra*, 10 Harv. J. Legis. at 219.

[23] A 1970 Report by the House Committee on Government Operations estimated that there were between 2600 and 3200 interagency and advisory committees, with thousands of committee members and assigned staff personnel, and an annual cost of as much as $75 million. H.R. Rep. No. 1731, *supra*, at 14-15; *FACA Sourcebook* 227-228. Indeed, the Report found that "[t]here are, even, committees to advise advisory committees." H.R. Rep. No. 1731, *supra*, at 5; *FACA Sourcebook* 218. See also S. Rep. No. 1098, *supra*, at 3; *id.* at 5-6.

[24] See, *e.g.*, H.R. Rep. No. 1731, *supra*, at 12; *FACA Sourcebook* 225.

[25] See H.R. Rep. No. 1731, *supra*, at 13; *FACA Sourcebook* 226.

[26] *Id.* at 5; *FACA Sourcebook* 218.

cies.[27] As the House Report on the bill that ultimately became the FACA explained, "[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). The Senate Report on the FACA made the same point, stating that "[t]he lack of public scrutiny of the activities of advisory committees was found to pose the danger that subjective influences not in the public interest could be exerted on the Federal decisionmakers." S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972).

Finally, Congress concluded that the 1962 executive order issued by President Kennedy (see page 24 note 21, *supra*) had been ineffective, for several reasons. The order did not apply to Presidential advisory committees; it left the responsibility for managing advisory committees to individual departments and agencies; it contained no provisions relating to the funding of such committees; and it authorized a waiver of its requirements whenever a waiver was deemed to be in the public interest. Moreover, many departments and agencies had no established procedure for enforcing the executive order. H.R. Rep. No. 1731, 91st Cong., 2d Sess. 9 (1970). Indeed, the executive could not even provide Congress with a complete list of advisory committees, or their total cost to the government. H.R. Rep. No. 1017, *supra,* at 7-8; H.R. Rep. No. 1731, *supra,* at 10-11, 14-15. In sum, "[a]t best, [the 1962] Executive Order * * * provides minimum basic management control over only a small portion of the advisory committee mechanism." H.R. Rep. No. 1731, *supra,* at 9.

The provisions of the FACA were designed to achieve their objectives without unduly limiting the executive's ability to rely on the assistance of advisory committees. To ensure that advisory committees do not waste the public's funds, Section 5 directs congressional committees to oversee the advisory committees under their jurisdiction in order to determine whether they should be abolished, revised, or redirected, and whether an existing committee can do the work of a newly-proposed committee. Section 5 also requires the executive to follow those guidelines, to the extent they are applicable, when creating an advisory committee. Section 6 requires the President to report to Congress annually on the operation of Presidential advisory committees, and to report, within one year of the submission of the public report of such a committee, on his actions or reasons for inaction on the committee's report. Moreover, Section 9(a) provides that an advisory committee shall not be established unless authorized by law or by the President, or unless the head of the responsible agency, after consulting with the Administrator of General Services, formally finds that establishing a committee is in the public interest. To ensure that advisory committees do not improperly or unduly influence the implementation of federal law, Sections 5, 9, 10, and 11 impose various requirements on the composition and operation of advisory committees, such as the balanced membership requirement for committees established or created by government, the records access and open meetings requirements, and the requirement that a federal officer call, attend, and control the agenda of each committee meeting. Finally, to ensure that advisory committees are effectively supervised and managed, Sections 7 and 8 require the Administrator of General Services and the heads of the responsible federal agencies annually to review the need for and effectiveness of advisory committees and to adopt management controls for their operation.

2. This history confirms that the FACA was Congress's response to two particular criticisms of advisory committees, and that Congress had in mind two noncontroversial purposes: (1) controlling the ever-increasing expenditure of federal funds on inefficient and duplicative advisory committees, and (2) counteracting the tendency of various interest groups to exert undue influence on federal agencies having regulatory or policy authority over matters directly involving those interests. Neither purpose is relevant to the President's reliance on the ABA Committee. The Committee does not make use of any federal funds, and it is not in any way concerned with the implementation of

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[27] See generally Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1667 (1975).

legislative policy by an executive agency. Instead, the ABA Committee is concerned with advising the President on the exercise of his prerogative under Article II to nominate federal judges.

Moreover, the structure of the FACA reveals that it was not designed to regulate this activity. Such specific requirements as termination after a committee has finished its task or in any event within two years of its creation, the presence of a federal officer at all committee meetings, federal control of the committee's agenda, and reporting to Congress on committee recommendations not adopted by the President, are a sensible regulation of the operation of advisory committees that receive federal funds or that influence the implementation of congressional policy. But they are wholly inapt with respect to a group that imposes no cost on the public fisc and that advises the President on his exercise of a power vested solely in him by the Constitution.

Given the history and structure of the FACA, it may be appropriate to give the terms "committee" and "advice" the broad reading that appellants suggest, in order to ensure that federal funds are not misspent and that congressional policy is properly implemented. But there is no call for giving the term "utilized" the broad, dictionary reading that appellants espouse, because there is no indication in the history or structure of the Act that Congress intended the term to place a significant and highly questionable limitation on the President's ability to rely on private counsel. Indeed, that term appeared in neither the House nor the Senate bill. The House bill limited the definition of an advisory committee to a committee "established" by statute, the President, or an agency. H.R. 4383, 92d Cong., 2d Sess. § 3(2) (1972), reprinted at *FACA Sourcebook* 301. The Senate bill defined an "agency advisory committee" as an entity "established or organized" under a statute or by the President or a federal officer. S. 3529, 92d Cong., 2d Sess. § 3(1) (1972), reprinted at *FACA Sourcebook* 175. The term "utilized" was added to the FACA by the Conference Committee, which did not specify its meaning. H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 2, 9 (1972). Under these circumstances, there is no

reason to conclude that the term "utilize" encompasses the President's reliance on private organizations, like the ABA Committee, in situations wholly beyond the scope of Congress's concerns.

3. The limiting construction we propose is buttressed by the need to avoid the serious constitutional problems that would arise from applying the FACA in the circumstances of this case. As explained in Point III below, the nomination power belongs to the President alone, and this centralization of authority serves vital purposes in our constitutional system. The FACA therefore should not be read to govern confidential advice of the kind sought and received by the President from the ABA Committee unless and until Congress has clearly stated its intent to accomplish that constitutionally suspect result.

In analogous circumstances, this Court has read statutes to avoid difficult constitutional questions. For instance, in *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court found an implied exception from a broadly worded statutory provision authorizing judicial review of administrative orders concerning overseas and foreign air transportation routes. Because judicial review might have led to serious interference with the President's authority over foreign affairs, the Court declined to give the statute its literal meaning in the absence of evidence that "Congress foresaw or intended the consequences." *Id.* at 110.[28] Here, because there is similarly no clear expression of Congress's intent to bring about a constitutionally questionable result, the text of the FACA should not be read to create such a problem.[29]

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[28] There are many other examples of this Court's insistence on a clear statement of congressional purpose in areas raising significant questions of the allocation of authority among branches of the federal government, or between the federal government and the states. See, *e.g.*, *Webster* v. *Doe*, 108 S. Ct. 2047, 2053 (1988) (declining, absent a clearly expressed legislative intent, to read a statute as precluding review of a constitutional claim against the Director of Central Intelligence—in part to avoid "the 'serious constitutional question' that would arise" if the act were so read); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command"); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review");

Application of this principle is also appropriate in this case for two additional reasons. First, when the FACA was passed, the Senate must have been aware, through its role in the confirmation process, of the well-known practice of relying on the ABA Committee for confidential advice on judicial nominations. Cf. J.S. App. 18a-19a. Indeed, the ABA Committee was by 1972 probably one of the best known committees providing advice to the executive. Yet, to our knowledge there is not the slightest expression in the FACA or in its extensive legislative history of an intent to include within the reach of the Act any advice sought by the President in connection with the nomination of federal judges.[30]

Second, imputing to Congress the intent to regulate the nomination process through the FACA would be particularly inappropriate, since Congress in 1978 expressly recognized the constitutional limitations on its own power in this area. As a condition of the creation of new federal district judgeships in the Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, Congress provided that the Act would take effect upon the President's promulgation of standards and guidelines for merit selection of nominees for the new judgeships. Both the

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Atascadero State Hospital v. *Scanlon*, 473 U.S. 234, 243 (1985) (courts should not conclude that Congress has abrogated a State's Eleventh Amendment immunity unless Congress has "express[ed] its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").

[29] Cf. *Nader* v. *Baroody*, 396 F. Supp. at 1234 (in holding that the FACA does not apply to informal contacts between the White House and private groups, the court said: "Nowhere is there an indication that Congress intended to intrude upon the day-to-day functioning of the presidency").

[30] A congressional committee is presently examining the role that the ABA Committee plays in the appointment process. Legal Times, Feb. 20, 1989, at 5.

terms of the Act and its legislative history show that, because of the Article II limitations on Congress's powers, the provision was regarded only as precatory. Section 7(b) of the Omnibus Judgeship Act of 1978 provided that the President could waive any such standards, and Section 7(c) provided that "no nomination or appointment to a United States district court judgeship may be invalidated on the basis of the President's failure to comply with this section or with any standards or guidelines promulgated under this section." 92 Stat. 1633. As the House Judiciary Committee report explained with regard to the merit provisions of the proposed bill (which was enacted in a slightly revised form): "Under article II of the Constitution, the President is given the power to nominate, and by and with the consent of the Senate, to appoint Federal judges authorized by the Congress. [The merit provision] is not an attempt to circumvent, limit or interfere with the exercise of that authority." H.R. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978).

The interpretation of the FACA that we propose here does not purport to resolve all the difficult questions that may arise; any such effort would be premature and inappropriate. But we submit that there is a clear distinction between those groups that lie at the very core of the Act's objectives and those that lie beyond its reasonable and intended scope. In the former category are committees that operate at public expense and committees that advise federal officials with the responsibility for implementing legislative policy. In the later category are groups, like the ABA Committee, that advise the President concerning a power expressly and exclusively vested in him by the Constitution and not subject to legislative restriction.[31] Only if Congress has made clear its intent to control such a power should this Court reach the difficult constitutional questions that such a law would present.

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[31] Other comparable powers include the veto and pardon powers.

III. APPLYING THE FACA TO THE PROCESS BY WHICH THE PRESIDENT OBTAINS ADVICE NECESSARY TO NOMINATE JUDGES TO THE FEDERAL BENCH WOULD UNCONSTITUTIONALLY INTERFERE WITH THE PRESIDENT'S ARTICLE II NOMINATION POWER[32]

A. The Power To Nominate The "Officers Of The United States" Is A Prerogative Of The President

The Appointments Clause, Art. II, § 2, Cl. 2, expressly provides that "*The President * * * shall nominate*, and by and with the Advice and Consent of the Senate, shall appoint Ambassasors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" (emphasis added). This Clause is not merely a matter of "etiquette or protocol," but plays a "substantive" role in the separation of powers. *Buckley* v. *Valeo*, 424 U.S. 1, 125, 126 (1976). The sole limitation on the President's power is found in the Incompatibility Clause, Art. I, § 6, Cl. 2, which, in relevant part, states only that "[n]o Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of

the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." The constitutional text itself therefore recognizes that the power to nominate the "Officers of the United States" belongs to the President and to him alone. Cf. *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (so describing the Pardon Power of Art. II, § 2, Cl. 1).

The Framers underscored the point in their words and actions. Alexander Hamilton explained in *The Federalist* No. 76, at 456-457 (C. Rossiter ed. 1961), that "[i]n the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment."[33] Hamilton also concluded that "[it] will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made." *Id.* No. 66, at 405.[34] Other Framers and early members of the new federal government, including George

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[32] If the Court accepts our standing argument in Point I, but rejects our statutory argument in Point II, the case could be remanded to the district court to determine whether, in light of the FACA's exceptions to the open meetings and records access requirements, see 5 U.S.C. App. 10(b) and (d), appellants are entitled to any of the materials they have requested, or to attend any of the Committee's meetings.

We note, however, that a remand on the records access and open meeting issues may have serious ramifications. Under the FACA, the ABA Committee meetings are not automatically closed simply because they fall within the Sunshine Act exceptions. The Committee's meetings would be closed only if the President or the Attorney General determines that they may be closed and so states in writing with his reasons. 5 U.S.C. App. 10(d). Even if that authority exists, the ABA Committee may be unwilling to participate in a system under which the government will control access to the Committee's materials and meetings. If so, the option of closing the Committee's meetings and withholding its materials would not eliminate the injury to the President resulting from application of the FACA to the ABA Committee.

[33] *The Federalist* is a particularly valuable source of the intent of the Framers and the meaning of the Constitution. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

[34] Hamilton also explained why the President would have this "sole duty": "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." *The Federalist* No. 76, at 455-456.

Washington,[35] James Wilson,[36] and Thomas Jefferson,[37] also emphasized, both before and after the Constitution was adopted, that the nomination power belongs to the President alone. And Jefferson, like Hamilton before him, stressed the value of this sole prerogative in assuring that "responsibility weighs with its heaviest force on a single head."[38]

Appellants maintain that the debates in the Constitutional Convention on the adoption of the Appointments Clause reveal the Framers' belief that Congress would have the authority to regulate the President's exercise of his nomination power. WLF Br. 29-32; Public Citizen Br. 28-30. In fact, the lesson to be drawn from the debates on the Appointments Clause is exactly the opposite, since the Framers rejected proposals that would have vested the nomination authority elsewhere. See *Buckley* v.

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[35] President Washington frostily responded to criticism from then-Senator James Monroe regarding a possible appointment for Hamilton by stating that "I *alone* am responsible for a proper nomination." L. White, *The Federalists: A Study in Administrative History* 85 (1948). President Washington also noted in his diary that James Madison agreed with Thomas Jefferson and John Jay that the powers of the Senate extend "no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution." J. Harris, *The Advice and Consent of the Senate* 40 (1953).

[36] James Wilson explained to the Pennsylvania ratifying convention: "The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality, *no appointment can take place without his nomination;* and he is responsible for every nomination he makes." 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis added) (hereafter cited as *Elliot's Debates*).

[37] As Secretary of State, Thomas Jefferson noted that "[t]he Constitution itself * * * gives the *nomination* of the foreign Agent to the President, the *appointment* to him and the Senate jointly, the *commissioning* to the President." Opinion by Secretary of State Thomas Jefferson on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), quoted at 4 P. Kurland & R. Lerner, *The Founders' Constitution* 109 (1987).

[38] *Id.* at 36. Congress too has recognized that the nomination power belongs solely to the President. H.R. Rep. No. 858, *supra*, at 6-7, quoted at page 31, *supra*.

Valeo, 424 U.S. at 129-131; ABA Br. Point III. A. (both describing the evolution of the Appointments Clause).

Appellants also rely on the fact that the Senate must confirm the President's nominees and on Congress's power to create "inferior Courts," Art. I, § 8; Art. III, § 1, as authority to regulate the President's appointment power. WLF Br. 29-36; Public Citizen Br. 31. Neither principle, however, provides a legitimate basis for Congress to interfere with the President's Article II nomination authority. The Senate's role in the confirmation process is expressly defined and circumscribed by the text of Article II to the limited power to confirm or disapprove the President's nominees.[39] In addition, although this Court has held that in some circumstances Congress may qualify the President's authority to *remove* an official who exercises executive power,[40] no decision of the Court suggests that Congress may interfere with the President's power to *nominate* a person for federal office. In fact, because Article II precisely limits both the role that the Legislative Branch plays in the appointment process and the Chamber that is to fill that role, interference with the President's clearly defined function would threaten the scheme that the Framers established. Cf. *Buckley* v. *Valeo*, 424 U.S. at

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[39] The Framers also made that point. James Iredell described to the North Carolina Ratifying Convention the precise limits of the powers of Congress regarding appointments: "As to offices, the Senate has no other influence but a restraint on improper appointments." *Quoted at* P. Kurland & R. Lerner, *The Founders' Constitution* 102 (1987). James Madison said in the debate in the First Congress on the President's removal authority: "If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers * * *. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. *This done, the Legislative power ceases.* They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." 1 *Annals of Cong.* 581-582 (J. Gales ed. 1789) (emphasis added).

[40] See *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

126-137 (Congress cannot appoint officers who perform an executive function).[41]

Moreover, Congress's authority to create the judicial positions at issue does not mean that in doing so Congress can override the limitations placed on its power by the Appointments Clause. In *Buckley* v. *Valeo, supra,* the Court recognized that Congress has the power under Article I to regulate congressional elections and under the Necessary and Proper Clause to create offices to carry out that function. Nonetheless, the Court held, Congress cannot disregard the requirements of the Appointments Clause in exercising either power; instead, appointment of the members of the Federal Election Commission must comply with the appointment process defined in Article II. 424 U.S. at 131-135. Congress thus cannot invoke its power to create lower federal courts as a ground to regulate the President's authority to nominate the judges who will serve on those courts.[42]

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[41] Public Citizen errs in contending (Br. 30-31) that Hamilton's criticisms in *The Federalist* No. 77 of the use of appointment councils shows that the FACA may constitutionally be applied to regulate the nomination process. Hamilton criticized the practice of authorizing a council to make appointments precisely because such a practice diffuses responsibility. See *The Federalist* No. 77, at 461. The ABA Committee, of course, does no more than render its advice to the President, who alone makes a nomination and therefore bears personal responsibility for his choice.

[42] Our argument is supported by the proposition that Article III judges are Principal Officers under the Appointments Clause and therefore must be appointed by the President. This Court has never precisely defined the line between Principal and Inferior Officers, see *Morrison* v. *Olson,* 108 S. Ct. at 2608, but a practical construction of the Constitution demonstrates that judges of the "inferior courts" are not "inferior Officers" and therefore must be appointed by the President with the advice and consent of the Senate. See 2 J. Story, *Commentaries on the Constitution of the United States* § 1579, at 403 n.1; § 1599, at 415 n.1 (5th ed. 1891); E. Corwin, *The President, Office and Powers* 76 & n.28 (4th ed. 1957) ("The term [Inferior Officer] seems to suggest in this particular context officers intended to be subordinate to those in whom their appointment is vested, and at the same time to exclude the courts of law and heads of departments.").

Article III judges have none of the criteria listed in *Morrison,* 108 S. Ct. at 2608-2609, to identify the Independent Counsel as an Inferior Officer. Judges

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are not removable by a higher authority even for cause; they can only be impeached by Congress. Judges do not perform limited duties, unless that term would apply also to the Justices of this Court in the sense that Congress by law defines the jurisdiction of the federal courts. Article III judges have wide-ranging authority, not the least of which is to hold unconstitutional laws enacted by the political branches of the federal and state governments. The jurisdiction exercised by lower federal judges therefore is not limited in the same sense as that of the Independent Counsel in *Morrison*. Finally, judges do not have a limited tenure, because they "hold their Offices during good Behavior." Art. III, § 1. This last factor is a key one, since "[i]t cannot, for a moment, be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life." *In re Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839). *Id.* at 260 ("all inferior officers appointed under [the Presidents, Heads of Departments, or Courts of Law], by authority of law, must hold their office at the discretion of the appointing power").

Admittedly, the Constitution uses the term "inferior" to denote the federal courts below this one. Art. I, § 8; Art. III, § 1. That designation means that the rulings of those courts can be reviewed by this Court, but does not mean that judges of the inferior courts are subordinate to the Justices of this Court or to any other officer. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (plurality opinion) (the "guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism"). Thus, the President may not be excluded from the process of appointing circuit and district court judges.

Our argument in text, however, does not rest on that conclusion. Even if circuit and district judges were Inferior Officers and could be appointed by the Attorney General or the courts, the FACA's intrusion into the nomination power would still be invalid. The Appointments Clause gives the President the exclusive nomination authority unless Congress also surrenders the Senate's oversight power entirely by making other provision for appointments. Because Congress has not exercised that option, the first procedure in the Appointments Clause governs and divides the appointment power between the President and the Senate in the manner described.

B. The Ability To Receive Candid Advice And To Keep That Advice Confidential Is Essential If The President Is To Be Able Effectively To Exercise His Nomination Power

For 200 years, since George Washington sought advice on potential nominees for federal office, our Presidents have stressed their belief that, in order to exercise the nomination power effectively and judiciously, they must be able to receive confidential advice from a wide range of sources.[43] This belief, and the reasons for it, were eloquently and forcefully stated by President Tyler when he refused to disclose to the House of Representatives the names of House members who had sought appointment to federal office:

> All appointments to office made by a President become from the date of their nomination to the Senate official acts, which are matter of record and are at the proper time made known to the House of Representatives and to the country. But the applications for office, or letters respecting appointments, or conversations held with individuals on such subjects, are not official proceedings, and cannot by any means be made to partake of the character of official proceedings, unless after the nomination of such person so writing or conversing . . . the President shall think proper to lay such correspondence or conversations before the Senate. * * * [I]t becomes me, in defense of the Constitution and laws of the United States, to protect the Executive department from all encroachment on its powers, rights and duties. In my judgment, a compliance with the resolution . . . would be a surrender of duties and powers which the Constitution has conferred *exclusively* on the Executive. . . . The appointing power, so far as it is bestowed on the President, is conferred without reserve or qualification. . . . I cannot perceive anywhere in the Constitution any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the Executive department, or any duty resting upon the House . . . by which it may become responsible for any such appointment.

A. Breckenridge, *The Executive Privilege* 40 (1974) (footnotes and citation omitted).

This longstanding belief is eminently sound. Speaking in a related context in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), this Court recognized that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." Thus, there is an undeniably "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.* at 705. Indeed, "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Ibid.* (footnote omitted). See also *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980); *National Anti-Hunger Coalition*, 557 F. Supp. at 530.

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[43] President Washington sought advice on potential nominees from sources other than the Senate shortly after assuming office, R. Swanstrom, *The United States Senate, 1787-1801*, at 95 (1985), and treated the role of the Senate regarding appointments as merely a power to approve or disapprove his nominations. (The nominations were presented only by written messages, a practice that has been followed by Presidents since then. *Id.* at 96-99.) President Washington sought confidential opinions from then-Representative James Madison regarding certain individuals who had applied for judgeships. *Id.* at 101.

President Jefferson warned Treasury Secretary Albert Gallatin against disclosing letters of recommendation about possible nominees because "[r]ecommendations when honestly written should detail the bad as well as the good qualities of the person recommended. That gentlemen may do freely if they know their letter is to be confined to the president or the head of a department. But if communicated further it may bring on them troublesome quarrels. In Gl. Washington's time he resisted every effort to bring forth his recommendations." J. Harris, *supra*, at 47. For reasons of confidentiality, President Jefferson also refused to provide the Senate with papers revealing the reasons for his nominations, stating that "[m]y nominations are sometimes made on my own knowledge of the persons; sometimes on the information of others given either voluntarily or at my own request and in personal confidence. This I could not communicate without a breach of confidence, not, I am sure, under the contemplation of the committee. They are sensible the Constitution has made it my duty to nominate; and has not made it my duty to lay before them the evidence or reasons whereon my nominations are founded." N. Small, *Some Presidential Interpretations of the Presidency* 126 n.10 (1970).

President Cleveland ordered his Attorney General to refuse to provide papers to the Senate while it was considering approval of a nomination of a district attorney, noting that the withheld documents were "addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine." J. Richardson, 8 *Messages and Papers of the Presidents* 378 (1898). More recently, President Truman refused to make public confidential investigative files regarding his nomination of David Lilienthal as Chairman of the Atomic Energy Commission. J. Harris, *supra*, at 243.

The importance of confidentiality in the investigation of potential nominees, and in the dealings between the ABA Committee and the Executive Branch, is equally plain. As the district court pointed out, "[t]he hallmark of the ABA Committee's relationship with DOJ and its evaluation process is confidentiality." J.S. App. 21a. The ABA Committee itself believes that "[a] primary concern of the Committee in connection with its investigation of prospective nominees is confidentiality," and that "the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination." J.A. 18. See also *Confirmation Hearings* 320-321.

C. Application Of The FACA To The President's Reliance On The ABA Committee's Evaluations Would Unconstitutionally Interfere With The President's Ability To Exercise His Nomination Power

1. Application of the FACA to the ABA Committee would adversely affect the process by which the President selects judicial nominees in three ways. First, unless complete confidentiality could be assured, private parties might be reluctant to express to committee members controversial and unpopular views about potential judges. Second, requiring a federal official to be present at Committee meetings might deter committee members themselves from expressing their individual opinions

about potential nominees. Third, application of the FACA to the ABA Committee would subject the Committee to federal control of its operations and would leave in the hands of federal officials and ultimately the courts the determination whether the Committee's materials and meetings would be disclosed to the public. Depriving the Committee of a substantial measure of its present autonomy could lead the Committee to withdraw from the evaluation process altogether. All three prospects, or any one, would sharply curtail the President's ability effectively to select judicial nominees.

Such interference with the President's ability to make nominations is constitutionally impermissible. Allowing the President to receive advice from within and without the goverment, and to deliberate with his advisors on a potential nominee, is necessary for the type of thoroughgoing evaluation and exchange that is critical to an informed choice. In order for that process to work, the President must be able to assure those he consults that they may feel free to express controversial and unpopular viewpoints without the fear that their opinions will be revealed to a larger audience. Confidentiality is therefore necessary for candor, which in turn increases the quantity, value, and reliability of the information received by the President. Cf. *NLRB* v. *Sears, Roebuck* & Co., 421 U.S. 132, 150-151, 152-153 (1975); *EPA* v. *Mink*, 410 U.S. 73, 87 (1973). Moreover, the attempt to limit the President's ability to receive advice from the ABA Committee exposes the constitutional problem caused by the FACA in its starkest form, since it involves both a textually committed presidential prerogative and a private organization that receives no federal funds.[44]

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[44] Contrary to appellant's WLF's suggestion (WLF Br. 36-38), it is immaterial that the ABA Committee communicates its evaluations to the Attorney General, and thus to the President, through another official at the Justice Department. The President could not decide on nominations without the assistance of "subordinates" who "act for him under his direction." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). See also *The Federalist* No. 72, at 436 (A. Hamilton) (executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate"); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 809 (1982) ("Members of the Cabinet are direct subordinates of the President.").

Appellants contend that the proper approach is to balance the President's need to receive confidential advice against the need to control the work of advisory committees and to obtain access to information regarding the judicial nomination process. This Court has applied a balancing approach in cases in which Congress has assigned a function ordinarily associated with one branch to another branch, or to a governmental body with a certain degree of independence. See, *e.g.*, *Mistretta* v. *United States*, 109 S. Ct. 647 (1989); *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *CFTC* v. *Schor*, 478 U.S. 833 (1986); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (*Nixon* v. *GSA*).[45] But the Court has not followed that approach when Congress has sought to interfere with the exercise of a power expressly and exclusively vested in the President by Article II. *Bowsher* v. *Synar*, 478 U.S. 714 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983); *Buckley* v. *Valeo*, *supra*; *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). For example, in *Ex parte Garland*, *supra*, and *United States* v. *Klein*, *supra*, this Court refused to give effect to statutes interfering with the President's pardon power, which, like the nomination power, is committed solely to the President by Art. II, § 2, Cl. 1, and is unlimited in its scope. *Ex parte Garland*, 71 U.S. (4 Wall.) at 380 ("The power thus conferred is unlimited, with the exception [for "cases of impeachment"] stated. * * * This power of the President is not subject to legislative control."); *United States* v. *Klein*, 80 U.S. (13 Wall.) at 148. See generally *Schick* v. *Reed*, 419 U.S. at 266.[46]

Indeed, appellants surely do not suggest that if they prevail in this case, the result could be obviated if the President were simply to deal directly with the ABA Committee.

[45] In those instances, if the Court found a potential for disruption of the operations of a Branch, it looked to see if " 'that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.' " *Mistretta*, 109 S. Ct. at 660 n.13 (citation omitted).

[46] As the Court explained in *Schick* v. *Reed*, 419 U.S. at 266: "A fair reading of the history of the English pardoning power, from which our Art. II, § 2, cl. 1, derives, of the language of that clause itself, and of the unbroken

In the *Klein* case, the Court succinctly wrote that the law "certainly impairs the executive authority," and found little more discussion necessary. 80 U.S. (13 Wall.) at 148.

This case belongs in the latter category. The authority to nominate the officers of the United States is a prerogative of the President that can be judiciously exercised only if he can obtain confidential advice about potential nominees. Control by Congress over the President's ability to gather such information therefore intrusively regulates the manner by which the President carries out a function assigned to him alone. Moreover, the intrusion is especially objectionable with respect to the nominating function, because as Hamilton and Jefferson emphasized (pages 33-34 and note 34, *supra*), only undivided authority to nominate can justify undivided responsibility for the quality and integrity of the nominee.[47]

But if a balancing test is appropriate, the district court correctly applied it. J.S. App. 19a-26a. On the one hand, the President's need for confidential advice is obvious and unarguable, and the application of the FACA to this case will seriously disrupt the President's ability to obtain such advice. On the

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practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."

[47] We note also that the Constitution grants to Congress certain enumerated powers, and Congress may enact legislation only pursuant to those enumerated powers. *E.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (opinion of Black, J.); *id.* at 154 (opinion of Harlan, J.). See also J. Madison, *Report on the Virginia Resolutions* (1798), *reprinted in* 4 *Elliott's Debates* 528; *The Federalist* No. 33, 201-203 (A. Hamilton); 2 J. Story, *Commentaries on the Constitution of the United States* § 1238 (1891). In those instances where a private committee receives no appropriated funds and where its advice is limited to the President's exercise of his specific textual powers under the Constitution, there appears to be no specific enumerated power authorizing the regulation by Congress of such a committee's manner of advising the President. And, for reasons we elaborate in the text, it would not be "necessary and proper" within the meaning of Article I, § 8, for Congress to enact legislation that so fundamentally intrudes on powers exclusively granted to the President.

other hand, the Senate has its own investigative powers in the confirmation process and does not need the FACA to carry out that task. Moreover, Senate hearings during the confirmation process supply the public with an opportunity to learn about and comment on nominees. Accordingly, if a balance must be struck, the district court properly struck it in the President's favor.[48]

2. Appellant Public Citizen contends (Br. 36-37) that the President's power is sufficiently protected because the FACA contains exemptions from its records disclosure and open meetings requirements.[49] That argument is mistaken, for two reasons.

First, the FACA contains no exemption from the requirement that a federal official call and attend every advisory committee meeting. That intrusion may well dissuade various interested organizations from participating in the nomination process, for the same reasons that a private organization would be unwilling to expose its deliberations to public scrutiny.

Second, as explained earlier (at 6), Congress amended the FACA in 1976 in order to remove the deliberative process privilege under the FOIA as a ground for closing advisory committee meetings. Thus, the FACA does not protect the confidentiality of the ABA Committee's advice-giving process on the very basis that is ordinarily considered necessary for that process to function effectively.[50] Although other exemptions are available, it is not clear that they are adequate to safeguard the confidentiality of this process.[51] Given the ABA Committee's great concern for the importance of confidentiality, this uncertainty regarding the application of the FOIA and Sunshine Act exemptions—as well as the fact that it is up to the executive in every instance to claim an exemption, and up to the courts to decide whether to sustain the claim—could persuade the ABA Committee to decline to supply the President with its evaluations.

For those reasons, *Nixon* v. *GSA* does not support appellants. There, the Court declined to hold that the Presidential Recordings and Materials Preservation Act of 1976, Pub. L. No. 93-526, 88 Stat. 1695, was facially unconstitutional as a violation of executive privilege. That law authorizes a member of the executive branch—the Archivist of Presidential Papers—to collect and screen presidential papers for their eventual disclosure to the public. Unlike the FACA, the law expressly protects matters covered by the executive and deliberative process privileges. §§ 104(a)(5) and (d), 88 Stat. 1697, 1698.

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[48] This case is very different from *United States* v. *Nixon*. The Court held in that case that a contention of executive privilege, based on a "broad, undifferentiated claim of public interest in * * * confidentiality," 418 U.S. at 706, had to give way in the face of a subpoena that was "essential to enforcement of criminal statutes," *id.* at 707, and that was necessary to protect the "very integrity of the judicial system," *id.* at 709. The Court said that, on the one hand, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution," *id.* at 712, while "[o]n the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Ibid.* Furthermore, the material at issue was at that point only to be the subject of an in camera inspection by the district court and was not automatically to be publicly disclosed.

[49] Public Citizen minimizes (Br. 27) the effect of the FACA by labeling its mandates as procedural. Even if that were an accurate characterization, it lacks force, since here, as in many other contexts, procedure seriously intrudes into substance. See *Mistretta* v. *United States*, 109 S. Ct. at 665.

[50] As noted earlier (at 6 note 7), at least one court has held that FOIA exemption 5 (for deliberative process materials) is unavailable to prevent disclosure of advisory committee records. *Wolfe*, 403 F. Supp. at 242-243.

[51] The FACA does incorporate the FOIA and Sunshine Act exemptions relating to protection of material whose release would constitute an unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6), and 552b(c)(6). Although these exemptions would arguably apply to justify withholding information about potential judicial nominees, the exemptions protect only the privacy interests of individuals and not the Executive's fundamental need for candid and confidential advice concerning qualifications and experience, regardless of the privacy implications for the persons being considered. Moreover, the application of Exemption 6 not only requires the government to identify a particular personal privacy interest that is subject to protection and that would be threatened by disclosure, but also requires the courts to balance the rights of the individual against the public interest in disclosure. See *United States Dept. of State* v. *Washington Post Co.*, 456 U.S. 595, 599-603 (1982).

Thus, the very protections that the FACA eliminates were there preserved, and this Court heavily relied on that fact in rejecting the constitutional challenge. 433 U.S. at 444. Furthermore, the law left the control and screening of Presidential materials in the hands of the executive branch. *Id.* at 441-455.

In light of these key differences between the FACA and other statutes such as the FOIA, appellant Public Citizen incorrectly asserts (Br. 32-33) that affirming the judgment below would call into question the validity of these other statutes. As this Court has recognized, Exemptions 1 and 5 of the FOIA, which deal with classified information and the deliberative process, were designed to safeguard the powers of the executive. See *EPA* v. *Mink*, 410 U.S at 81-94. See also *Soucie* v. *David*, 448 F.2d 1067, 1080-1084 (D.C. Cir. 1971) (Wilkey, J., concurring). Moreover, neither the FOIA nor the Sunshine Act applies to the President and his immediate staff or advisors. See *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Rushforth* v. *Council of Economic Advisors*, 762 F.2d 1038, 1040, 1043 (D.C. Cir. 1985) (Sunshine Act covers only meetings of agencies headed by collegial bodies).

In sum, if, contrary to our submission, the Court concludes that the FACA was intended to apply to the President's reliance on confidential advice in the circumstances here, it should hold the Act unconstitutional as so applied.[32]

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[32] If the Court agrees with our submission, it, of course, would have no occasion to consider appellee ABA's defense of the judgment below on the ground that the FACA violates the ABA's First Amendment rights. Since the question was not reached in the court below, this Court would, in any event, have discretion to remand the case for consideration of that contention initially by the lower courts. We note only that, to the extent the ABA contention rests on a claim that it has a First Amendment right to engage in a confidential relationship with the government, we disagree. An analogous claim perhaps could be made with more force with respect to possible application of the FACA to the President's reliance on the advice of groups such as his own political party, which has a protected associational relationship with him. Cf. *Eu* v. *San Francisco County Democratic Central Committee*, No. 87-1269 (Feb. 27, 1989).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 1989

APPENDIX

1. Article II, § 2, Cl. 2, of the Constitution of the United States provides in part:

> The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The Federal Advisory Committee Act, 5 U.S.C. App. 1-14 (1982 & Supp. IV 1986), provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Advisory Committee Act".

Sec. 2. (a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that:

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

Sec. 3. For the purpose of this Act—

(1) The Term "Administrator" means the Administrator of General Services.

(2) The Term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time-officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

Sec. 4. (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

Sec. 5. (a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committees are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

Sec. 6. (a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted,

a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

Sec. 7. (a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be r[illegible]ed;

[illegible] whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members—

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5),

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent—

(A) An individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Director shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

Sec. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

Sec. 9. (a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions, Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

Sec. 10. (a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

Sec. 11. (a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

Sec. 12. (a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

Sec. 13. Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

Sec. 14. (a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

> (A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or
>
> (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

> (A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or
>
> (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

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REPLY
BRIEF

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Nos. 88-429, 88-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.,*
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.,*
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT PUBLIC CITIZEN

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REPLY BRIEF FOR APPELLANT PUBLIC CITIZEN

INTRODUCTION

The briefs filed by the Justice Department and the ABA create the impression that the Federal Advisory Committee Act is a new, untested statutory scheme, enacted by Congress for the express purpose of stifling the President's use of advisory bodies. To read the briefs of appellees in isolation would inevitably lead to the conclusion that FACA creates such onerous restrictions on the use of advisory committees that the President and federal agencies generally forgo their use entirely.

Appellees' portrayal of the advisory committee process, however, bears no resemblance to reality. FACA was enacted in 1972, not for the purpose of eliminating the many advisory committees that serve a valuable function but, rather, to create minimum standards of public accountability and openness that are consistent with the vital function that such committees play in government decisionmaking. As explained in the President's most recent annual report on federal advisory committees, Congress, in enacting FACA:

> formally recognized the merits of seeking out non-federal sources of information and advice. At the same time, however, the Congress also sought to ensure that the advice provided by committees be relevant, objective, and accessible to the public. The formalized process created by the FACA for use by the Executive Branch . . . seeks to achieve these objectives, as well as to provide a basis for continuing oversight of committee activities.

President's Seventeenth Annual Report on Federal Advisory Committees, at 1 (Fiscal Year 1988) (hereafter "President's Seventeenth FACA Report").

Consistent with this Congressional intent, the President and federal agencies have effectively incorporated FACA's procedural safeguards into their use of a large number of advisory committees. As detailed in the President's Seventeenth FACA Report:

> During fiscal year 1988, 58 Federal departments and agencies sponsored 1,020 advisory committees, a 17.3 percent increase compared with the number of groups in existence during fiscal year 1987. A total of 21,236 individuals served as committee members; 3,516 meetings were held; and 996 reports were issued.

Id. at 2. Moreover, during 1988, the executive branch used 205 peer review advisory committees which, as explained by Public Citizen in its opening brief and never refuted by appellees, are directly analogous to the ABA Committee. *See* PC Br. at 37. Finally, the President reported that, while the majority of the 3,516 meetings held by advisory committees in 1988 were open or partially open, nearly a thousand meetings were totally closed under the Act's exemptions, including meetings held by peer review committees to discuss the qualifications and credential of individuals seeking government grants or other benefits. President's Seventeenth FACA Report at 2.

Appellees simply have no answer to the question of why thousands of advisory committees have found it feasible to both comply with FACA and fulfill their advisory functions, yet application of the Act to the Justice Department's use of the ABA Committee is so fraught with difficulties that it rises to the level of a constitutional invasion. This omission is fatal, as we more fully explain below, to both appellees' statutory and constitutional arguments. Before turning to those matters, however, we first respond to the challenges that have been made to appellants' standing.

I. APPELLANTS HAVE STANDING TO CHALLENGE THE JUSTICE DEPARTMENT'S REFUSAL TO COMPLY WITH FACA'S CHARTERING AND OPEN GOVERNMENT REQUIREMENTS.

The Justice Department concedes that appellants have standing to press their claims under the open meeting and document access provisions of FACA, but it suggests that appellants cannot complain about the Department's failure to comply with any of the Act's other requirements. DOJ Br. at 11-16. The ABA, in contrast, advances the extreme position that neither appellant nor any member of the public has standing to assert any claim under FACA regarding the Department's use of the Committee. ABA Br. at 12-17. We have several responses to these contentions, which are being raised for the first time in this Court.[1]

To begin with, the ABA's argument is contrary to seventeen years of precedent in the lower federal courts. Since the enactment of FACA in 1972, the courts have, without exception, ruled that those denied access to meetings and records of advisory committees suffer a deprivation of statutorily-created rights in precisely the same manner as persons seeking access to records of federal agencies under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and meetings of federal commissions under the Sunshine Act, 5 U.S.C. § 552b.[2]

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[1] To the extent that appellees' standing defense focuses on purported deficiencies in appellants' complaints, see ABA Br. at 13-14, DOJ Br. at 12-14, their invocation of the defense for the first time in this Court is particularly inappropriate. Obviously, if either appellee had raised such claims below, appellants could have amended their complaints accordingly. Thus, unless the Court concludes that Article III erects an insurmountable barrier to appellants' standing, the defense should be deemed to have been waived.

[2] *See, e.g., National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (members of the public have standing to "enforce rights [to open meetings and records]

Contrary to the ABA's argument, this Court has never inquired into whether the interests of requesters under the FOIA or the Sunshine Act "would [in fact] be better served if they had access to the deliberations and documents" being sought. ABA Br. at 15. Thus, in its only ruling under the Sunshine Act, the Court resolved the merits of a claim without analyzing whether the plaintiff would in fact benefit from the information discussed at the meeting. *See FCC v. ITT World Communications*, 466 U.S. 463 (1984). And in resolving more than twenty cases under the FOIA over the past fifteen years, this Court has never suggested that those seeking to enforce the law need show any more than that they sought, and were denied access to, specific agency records. *See, e.g., Dep't of Justice v. Julian*, ___U.S.___, 108 S. Ct. 1606 (1988); *Brandon v. Eckard*, 569 F.2d 683, 687-88 (D.C. Cir. 1977) ("FOIA does not discriminate among persons seeking materials on grounds of their particular interests in the requested information"). Especially since section 10 of FACA expressly incorporates provisions of both the FOIA and the Sunshine Act, *see* 5 U.S.C. App. II §§ 10(b), (d), this Court should not, as the

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conferred by § 10" of FACA); *Physician's Education Network, Inc. v. HEW*, 653 F.2d 621, 622-23 (D.C. Cir. 1981) (allegations by a complainant that it "sought and was denied participation in the [advisory] panel's meetings . . . [is] sufficient . . . to support standing to invoke" FACA); *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 334 (2d Cir. 1979) (same).

These cases also refute the ABA's implication that the courts have not "construed FACA to give rise to an implied cause of action under any circumstances." ABA Br. at 15 n.11. Moreover, Congress has amended FACA twice since its enactment, yet has never repudiated the unbroken chain of precedent recognizing a right to bring suit to challenge FACA violations. *See* 5 U.S.C. App. II § 7, as amended, Pub. L. No. 96-523, § 2, 94 Stat. 3040 (1980); 5 U.S.C. App. II § 10, *as amended*, Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982) ("[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts . . . the question is whether Congress intended to preserve the pre-existing remedy"). In any case, as the Justice Department acknowledges, DOJ Br. at 16 n.14, appellants plainly have a right to seek relief under the Administrative Procedure Act from the Department's failure to satisfy its statutory responsibilities. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979).

ABA urges, establish widely divergent standing requirements for those seeking to safeguard their rights under these interlocking statutory schemes. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (persons denied truthful information about housing by private sources are denied right created in Fair Housing Act and thus have standing).[3]

In contrast to the ABA, the Justice Department contends that appellants have standing to assert claims under some sections of FACA, but not others. DOJ Br. at 12. Obviously, a finding that appellants have rights under *any* provision of the Act requires resolution of the threshold question of whether the Department's use of the ABA Committee is subject to the Act at all, which is the only statutory issue that must be decided now. *See* PC Br. at 35. In any event, appellants have properly asserted a deprivation of their statutory rights beyond their lack of access to some Committee meetings and records.

Thus, under section 9(c) of the Act, each agency using an advisory committee must prepare and file a charter informing the public of "the committee's objectives and scope of its activity"; "the duties for which the committee is responsible"; and "the estimated number and frequency of committee meetings." *Id.* at §§ 9(c)(B), (F), (I). Similarly, in addition to giving the public the right to attend non-exempt meetings of advisory committees, the statute also requires that, as a general rule, "interested persons" are entitled to receive notice of all committee meetings on a timely basis. *Id.* at § 10(a)(2). When "interested persons," such as appellants, are deprived of the opportunity to review a committee charter or are not given the advance notice of meetings required by the Act, they have "suffered injury in precisely the form the statute was intended to guard against." *Havens Realty, supra,* 455 U.S., at 373. Accordingly, under the government's own theory, appellants have standing because they have asserted cognizable injuries under a number of FACA's provisions, each of which is designed to provide members of the public with additional information regarding the activities and operations of advisory committees. For all these reasons, appellees' standing arguments should be rejected.[4]

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[3] The ABA's argument on causation and redressability makes even less sense than its argument on injury-in-fact. *See* ABA Br. at 16-17. While Public Citizen agrees that most, if not all, discussions of the suitability of potential nominees for the federal bench could be kept confidential under FACA's exemptions, it has certainly not suggested, contrary to the impression created in the ABA's brief, that *all* meetings and *all* documents of the ABA Committee could be withheld from the public. *Id.* at 16. As Public Citizen stated in its opening brief, compliance with FACA would likely result in public access to additional discussions and documents regarding the overall functioning of, and role played by, the ABA Committee, including the procedures the Committee uses to investigate and evaluate judicial candidates, the manner in which the Committee votes on ratings, and the degree to which the Committee should, as a general matter, scrutinize the legal philosophy or political ideology of potential judicial candidates. PC Br. at 40.

II. THE JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE IS COVERED BY FACA.

Appellees and their *amici* urge this Court to ignore the plain language of FACA and to give the term "utilized" an artificially narrow construction that has no grounding in the statute itself. Under appellees' theory, FACA's coverage is not based on the langauge of the law, but on a free-floating assessment of whether the Act's underlying "purposes" will be furthered through its application in a particular case. DOJ Br. at 23-29; ABA Br. at 22-23. This argument violates fundamental principles of statutory construction, as the Department itself recognized shortly after FACA was enacted. In a series of memoranda prepared in 1973 and 1974, the Department's Office of Legal Counsel ("OLC") concluded that "[u]nder any reasonable construction of 'utilization,' the ABA Committee . . . is utilized by the Department," *Memorandum from OLC to Associate Deputy Attorney General,* at 4 (June 21 1974), and that "[a]n honest reading of the statute points in the direction of inclusion." *Summary Statement of View that FACA Applies to the ABA Committee, Attachment to Memorandum from Special Assistant to the Attorney General to Assistant Attorney General,* at 3 (January 23, 1974) ("Summary Statement") (these memoranda have been lodged by the Department with the Court).

As this Court recently reaffirmed, "[d]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke,* 471 U.S. 84, 95 (1985), *quoting Richards v. United States,* 369 U.S. 1, 9 (1962); *see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) (the plain language of a statute "must ordinarily be regarded as conclusive"). Thus, "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously,' even under the best of circumstances." *American Tobacco Co. v. Patterson,* 456 U.S. 63, 75 (1982), *quoting Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 26 (1977). And, when "nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke, supra,* 471 U.S., at 96.

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[4] We agree with the Department that there is no reason for this Court to consider how FACA's provision for balanced representation should be applied to the Justice Department's use of the ABA Committee. DOJ Br. at 14-15. As the government notes, there is an unresolved statutory issue as to whether this provision applies to committees that are "utilized" rather than "established" by the government. *Id.* at 16-18. Moreover, even if the provision were applicable here, its actual application would depend on the precise function and purpose of the Committee, as spelled out in the charter that would be filed by the Department. *See National Anti-Hunger Coalition, supra,* 711 F.2d at 1074. Accordingly, at least until the Department has had the opportunity to delineate the Committee's function in a charter, it would be premature to consider the applicability of the Act's balanced representation provision. *See* PC Br. at 4-5.

That is precisely the domain appellees are urging this Court to enter: there is nothing in FACA's legislative history which suggests that Congress did *not* intend the word "utilized" to be given its ordinary meaning, or that long-term, entrenched advisory relationships like the one involved here should not be covered by the law. To the contrary, Congress could not have been clearer in declaring that the statute was "meant to include those committees [like the ABA Committee] *which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory Committee formed by the President himself or the agency itself.*" H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972) (emphasis added), *reprinted in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts and Other Documents*, 95th Cong., 2d Sess. 274 (Comm. Print 1974) ("Source Book").[5]

Moreover, even if the Court were to pursue appellees' peculiar brand of statutory construction, their arguments regarding FACA's "purposes" are based on nothing more than their own subjective and self-serving assertions of the underlying reasons why FACA was enacted. We agree that one of Congress' objectives in enacting FACA was to eliminate some unnecessary advisory bodies and reduce the costs of others. ABA Br. at 22; DOJ Br. at 25. It is likewise correct, as the district court observed, that "Congress may have been particularly motivated to shine the light on agency relationships with special interest or regulated groups . . . ." App. 12a. But to suggest, as do appellees, that these were the sole or even predominant objectives of the law is simply to ignore Congress' own statement, *in FACA itself*, as to why it was creating the statutory scheme at issue.[6]

Remarkably, while appellees purport to present the "Congressional concerns underlying the enactment of FACA," ABA Br. at 24, and the "two noncontroversial purposes" that Congress "had in mind" in passing the law, DOJ Br. at 27, neither of them even cites the "Findings and Purposes" section contained in the Act. *See* 5 U.S.C. App. II § 2(b). The *six* sweeping Congressional objectives delineated in that provision underscore Congress' intent to establish a comprehensive statutory scheme that would create basic standards and safeguards for all advisory committees used by the executive branch, not simply those that are deemed by the government to be "inefficient," DOJ Br. at 25, or to pose the risk of "'agency capture.'" *Id.* at 25. Of particular pertinence here, Congress "declare[d] that . . . the public should be kept informed" regarding the "purpose, membership, [and] activities" of all advisory committees. 5 U.S.C. App. II § 2(b)(5). Congress did not state that this vital public education function should apply only to some advisory committees and not others, and it certainly did not suggest that the public's right to learn about the practices and procedures of influential executive branch advisory bodies should be restricted along the arbitrary lines invented by appellees, *i.e.*, the public may learn about committees that are influencing agencies' implementation of statutes, but not equally powerful and publicly-significant committees influencing other functions of the Executive Branch.

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[5] Contrary to the assertion of the ABA and People for the American Way, nothing in the Conference Report repudiates this statement. In fact, the Conference Committee emphasized that it had "adopt[ed] the House definition of 'Presidential advisory committee' *without any change* . . . ." *Id.* at 323 (emphasis added). In any case, since the ABA only began to provide confidential recommendations regarding potential judicial nominees at the direct request of the Executive Branch, ABA Br. at 46, its advisory arrangement was, in the words of the Conference Report, "directly established . . . *for*" the Justice Department and the President. *Id.* at 324 (emphasis added).

[6] Of course, even if appellees had accurately described Congress' principal objectives in creating FACA's requirements, that would hardly be "sufficient to overcome . . . the clear, generic meaning" of the "language which Congress enacted . . . ." *Regan v. Wald*, 468 U.S. 222, 237 (1984). Contrary to appellees' supposition, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in the legislative history," particularly where "the text of the . . . statute plainly embraces criteria of more general application." *Pittston Coal Group v. Sebben*, ___ U.S. ___, 109 S. Ct. 414, 420-21 (1988).

In particular, there is no support whatsoever for appellees' assertion that the public's interest in learning about the operations and activities of advisory committees is "wholly inapt with respect to a group that . . . advises the President on his exercise of a power vested solely in him by the Constitution." DOJ Br. at 28; *see also* ABA Br. at 24-25. Indeed, the D.C. Circuit rejected an identical argument regarding the reach of the FOIA in the course of holding that documents obtained and generated by the Attorney General "for the ultimate benefit of the President in a nominating role that is exclusively his" are agency records covered by the FOIA. *Ryan v. Dep't of Justice*, 617 F.2d 781, 786, 788 (D.C. Cir. 1980). In *Ryan*, Judge Malcolm Wilkey, writing on behalf of Judges Carl McGowan and Gerhard Gesell, emphatically rejected the government's contention that the FOIA should not apply to records regarding the nomination process because the

> nomination of judges is a purely presidential function . . . Such an approach, defining 'agency records' by the purpose for which they exist, would cut back severely on the FOIA's reach as interpreted by courts since its inception . . . Documents of the Central Intelligence Agency and the National Security Agency are compiled precisely for the function of advising the President in the solely presidential role of Commander-in-Chief. Yet in many FOIA encounters with NSA and CIA, we have never held or seriously considered that [their records are not subject to the FOIA].

Id. at 788. Accordingly, Judge Wilkey concluded that the limitation on the FOIA manufactured by the Justice Department "does not appear as either a realistic or intended distinction under the Freedom of Information Act." *Id.* at 787. The distinction urged by appellees here has likewise been invented out of whole

cloth and makes no more sense than in the FOIA context. Thus, if Congress did not exclude from the FOIA records created by the Justice Department to assist in the nomination process or other "purely Presidential function[s]," *Ryan, supra*, 617 F.2d at 788, it would be anomalous in the extreme to hold that Congress intended to exclude from FACA the records and deliberations of advisory committees that assist the Department in those same activities, especially since Congress incorporated the FOIA's exemptions into FACA.[7]

Appellees also never come to grips with the fact that Congress expressly excluded from the FACA's coverage a number of advisory committees, such as those that are "established or utilized" by the Federal Reserve System, *id.* at § 4(a), but it did *not* exclude the ABA Committee, even though, according to appellees, it "must have been aware . . . of the well-known practice of relying on the ABA Committee for confidential advice . . .." DOJ Br. at 30. In other words, in FACA itself, Congress carefully drew the line it wanted between advisory functions that should be covered by the statute and those that should not. Therefore, the Court should reject appellees' suggestion that it discard the lines drawn and the balance struck by Congress and substitute those preferred by appellees.[8]

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[7] In addition to the nomination function, appellees suggest that their limitation on the applicability of FACA would apply to numerous other Executive Branch functions that are described as "exclusively vested in [the President] by the Constitution," including the veto and pardon powers and the power to negotiate treaties. DOJ Br. at 31; ABA Br. at 20 n.17. Not only would this carve out a gaping hole in FACA's coverage without any evidence it was intended by Congress, but it would also run counter to the Executive Branch's application of FACA to a variety of advisory committees created to assist in the performance of these functions, such as the Advisory Committee for Trade and Negotiations, the General Advisory Committee on Arms Control and Disarmament, and the National Security Agency Advisory Board. *See* President's Seventeenth FACA Report at 30, 34.

[8] Appellees also contend that Congress' primary concern was to "counteract . . . the tendency of various interest groups to exert undue influence on

In addition to asking the Court to disregard the language of FACA itself, appellees also seek to circumvent the longstanding, common-sense construction of this language by the executive branch agency that has been "entrusted to administer" FACA. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The Department admits that the General Services Administration ("GSA") has been delegated the authority to develop government-wide rules and guidelines for the implementation of FACA, DOJ Br. at 27, yet — in stark contrast to the usual position taken by the Executive Branch before this Court — it suggests that the Court should place no stock whatsoever in GSA's definition of the term "utilized." That definition, as explained in our opening brief, PC Br. at 17-18, fits the ABA Committee like a glove and, just as importantly, it highlights why the ABA Committee is fundamentally different from the "legion of other groups" that may, from time to time, provide advice to the President and which everyone, including appellants, agree are not within FACA's coverage. DOJ Br. at 21.

As GSA has explained, an entity is being "utilized" as an advisory committee when it is being used in the "same manner as [an agency or the President] would obtain advice or recommendations from an established advisory committee . . .." 52 Fed. Reg. 45,930 (1987). Thus, at the threshold, covered entities must have, as Judge Gesell has reasoned, "some sort of established structure and defined purpose as 'advisory committees' . . ." *Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975). The ABA Committee meets this description because, as the district court observed, it "self-consciously and purposefully acts 'as a committee,'" for the "singular purpose" of rendering advice regarding judicial nominees, App. 10a, 11a, but the same cannot be said of *any* of the interest groups cited by appellees or *amici*. Indeed, none of those examples involves an advisory committee at all. Rather, they merely constitute "informal contacts by the President or his immediate staff with interested segments of the population," such as the AFL-CIO or the NAACP. *Nader v. Baroody, supra*, 396 F. Supp. at 1234. The courts have long since held that such contacts do not trigger FACA's coverage, and that interpretation is plainly reflected in GSA's regulations as well. *See* 52 Fed. Reg. 45,930.

Furthermore, even an entity structured as a committee is not subject to the Act if it is simply one of a number of groups providing the government with its views on an issue of public concern. Rather, it is the government's decision to adopt the entity "through institutional arrangements," 52 Fed. Reg. 45,930 (1987), as a "traditionally, routinely, and preferentially utilized source of advice," App. 11a, that renders the advisory relationship identical, as a practical matter, to the government's use of an "established" committee. Here, for example, DOJ has integrated the ABA Committee into its formal decision making process to such an extent that the Committee is the only entity outside the government that is regularly given access to confidential government information regarding prospective judicial nominees, and is even afforded the authority to *interview* and send questionnaires to prospective candidates, who must submit to this process if they want to be considered for nomination to the federal bench. J.A. 21-22. None of the examples cited by

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federal agencies having regulatory or policy authority over matters directly involving those interests," DOJ Br. at 27 (emphasis added), and had no concern with purely Presidential advisory committees not controlled by "regulated entities." ABA Br. at 23. However, if appellees' view was correct, then Congress would have limited the Act to advisory committees that are "established or utilized by one or more agencies," 5 U.S.C. App. II § 3(2)(C), and would not have included, as it did, a separate provision encompassing all committees that are "established or utilized *by the President* . . .." *Id.* at § 3(2)(B) (emphasis added). Since Congress intended the law to cover committees that render advice directly to the President, it certainly intended to apply the law to advisory bodies, like the ABA Committee, that merely report to a federal agency and not directly to the President.

appellees or *amici* is even remotely similar to this structured, mandatory, and exclusive advisory arrangement. Thus, a ruling that the ABA Committee is being "utilized" by the Justice Department in the same manner as a formally "established" committee would not sweep within FACA's scope the sorts of "amorphous, ad hoc" meetings that routinely take place between various interest groups and executive branch officials. *Nader v. Baroody, supra*, 396 F. Supp. at 1233.[9]

In their final statutory argument, both appellees suggest that Congress could not have intended to apply FACA to the ABA Committee because, in enacting the Omnibus Judgeships Act of 1978, it issued standards and guidelines regarding the nomination of district judges, but did not make them binding on the President. ABA Br. at 25; DOJ Br. at 30-31. However, the fact that Congress may have recognized limitations on its ability to prescribe *who may actually be nominated as a federal judge* bears absolutely no legal or logical relationship to the question of whether a general procedural statute such as FACA is applicable to an advisory committee used by the Justice Department, just as it has no bearing on whether the FOIA is applicable to "agency records" generated by the Justice Department regarding the nomination process. *See Ryan v. Dep't of Justice, supra*, 617 F.2d at 788. As we demonstrate more fully below, appellees have

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[9] This special, confidential relationship between the ABA Committee and the Department also answers the ABA's First Amendment claim, as the Department recognizes. DOJ Br. at 46 n.52. If the ABA declined to review confidential information regarding prospective judicial nominees and thus refused to be incorporated into the government's internal decision making process, then it would not be subject to FACA. In that event, the ABA would have the same right as any other group to discuss public information regarding the nomination process and to convey its views to the government. It is evident, therefore, that what the ABA is actually asserting is a First Amendment right to obtain government information that is not available to any other member of the public, and to have a confidential, exclusive, unaccountable advisory relationship with the government. Nothing in the First Amendment guarantees such special treatment for the ABA or anyone else.

failed to recognize the distinction between efforts by Congress to usurp for itself a power that is granted to the Executive Branch — such as an effort by Congress to control *who* may be nominated as a federal judge — and statutes such as the FOIA, the Sunshine Act, and FACA, which do no more than create neutral procedural requirements that must be followed by the executive branch when it exercises its statutory or constitutional responsibilities.

III. APPELLEES' APPOINTMENTS CLAUSE AND SEPARATION OF POWERS ARGUMENTS ARE WITHOUT MERIT.

Appellees spend most of their constitutional argument establishing a proposition with which we do not, and never have, disagreed, *i.e.*, that the Constitution assigns to the President and not the Congress the responsibility to nominate federal judges. But appellees have, once again, fallen woefully short of proving that the application of FACA to an advisory committee used by the Justice Department would significantly impair the President's ability to carry out his constitutionally-assigned nomination functions.

Appellees have not attempted to demonstrate that the application of any of FACA's requirements to the ABA Committee would violate the actual text of the Appointments Clause or, for that matter, any other provision of the Constitution. Nor have they shown that the application of procedural safeguards designed to increase public accountability would contravene the intent of the Framers. Indeed, neither of the appellees has a convincing response to the fact that such procedural safeguards dovetail with the concern of Alexander Hamilton — on whom appellees place primary reliance — that private committees not be permitted to exercise undue influence over the appointment process while being completely "impenetrable to the public eye

. . . ." *The Federalist* No. 77, at 500 (E. Earle ed. 1937).[10]

Since appellees cannot prove Congressional usurpation of an executive function, their argument hinges on the alleged effects that FACA would have on the Department's use of the ABA Committee. To support the sweeping ruling below, appellees contend that *none* of FACA's requirements can be met by the Department without destroying its advisory arrangement with the ABA Committee and, in turn, that destruction of that relationship will prevent the President from making informed nominations. However, appellees' argument ignores the fact that thousands of advisory bodies, including many that are directly comparable to the ABA Committee, have managed to comply with FACA without suffering such calamities. Appellees do not deny that the ABA Committee is virtually indistinguishable, in form and function, from the hundreds of peer review advisory bodies that are chartered under FACA. *See* PC Br. at 37 & n.6. Just as the ABA Committee assesses the professional qualifications and attributes of potential nominees to the federal bench, peer review committees of the National Science Foundation and the National Institutes of Health, for instance, evaluate the attributes and abilities of individuals seeking federal funds. *Id.* And, just as these peer review bodies have adapted to FACA's requirements without sacrificing necessary confidentiality or otherwise forfeiting their effectiveness, there is simply no reason why the same would not hold true for the ABA Committee.

Of the manifold provisions of FACA, appellees have directed most of their ire at only two features of the Act: the provisions that authorize public access to some meetings and records of

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[10] Indeed, the Senate Report expressly recognizes that the "federal decision-maker is . . . solely responsible for the execution of federal policy," Source Book at 163-64, and that Congress did not intend to usurp those responsibilities. Rather, FACA was passed to ensure that the executive's responsibilities would not improperly and secretly be usurped by committees consisting of private individuals. That is precisely the risk pinpointed by Hamilton in the Federalist Papers.

advisory committees, *see* 5 U.S.C. App. II §§ 10(a)(1), (b), (d), and section 10(e), which provides that a designated federal officer must "chair or attend each meeting of each advisory committee." *Id.* at § 10(e). But on close inspection, appellees' objections amount to all smoke and no fire. With respect to public access, appellees focus on the need to safeguard materials and discussions regarding the "professional qualifications of prospective nominees to the federal bench," including "confidential interviews with attorneys, judges and law professors in the nominee's community." ABA Br. at 36. On the other hand, appellees have asserted no reason to withhold the more general descriptions of the Committee's function, role, and activities regarding the nomination process that appellant Public Citizen actually seeks.

Most importantly, FACA's provisions were crafted, and can easily be applied, to accommodate the distinction between discussions of general policy, to which the public should ordinarily have access, and records and meetings relating to individuals, in which there may be a substantial interest in confidentiality. Thus, while appellees profess concern as to whether the Act's personal privacy exemption could be used to protect materials relating to the "qualifications and character of prospective judicial nominees," ABA Br. at 39, DOJ Br. at 45, they do not deny either that the exemption appears tailor-made for this purpose or that it is used by hundreds of peer review committees to protect identical materials. *See* President's Seventeenth Annual FACA Report at 2; PC Br. at 37 n.6. Particularly since the Department has never even attempted to apply FACA's provisions to the ABA Committee, the government's "uncertainty regarding the application of the FOIA and Sunshine Act exemptions," DOJ Br. at 45, does not afford a basis for declaring the law unconstitutional in its entirety.

The only other specific complaint that appellees have voiced with regard to FACA's provisions is that the ABA Committee does not want a federal officer to attend its discussions of potential judicial nominees. That is a strange argument indeed in view of appellees' assertion that the ABA Committee's role is to "deliberate with" federal officials and, ultimately, the President regarding potential judicial nominees. DOJ Br. at 41. It makes little sense for the government to contend that the interest ultimately at stake in this case involves the President's ability to obtain candid and reliable advice from the ABA Committee, *id.*, yet attack FACA on the grounds that Committee members do *not* want to express their candid views and opinions about potential nominees to a federal employee who, according to appellees, is the "direct subordinate[] of the President." *Id.* at 41 n.44, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982).

Moreover, appellees' attack on section 10(e) constitutes the classic straw man argument since the ABA concededly conducts virtually none of its evaluations of prospective judicial candidates through formal meetings. According to appellees, members of the Committee almost always transmit their votes on ratings to the Committee Chair "by mail or telephone," and they rarely, if ever, hold meetings to discuss prospective nominees. DOJ Br. at 4. Yet neither section 10(e), nor any other provision of FACA, would interfere in the slightest with this practice.

Both the Department and the ABA also complain about the lack of a general deliberative process exemption in FACA, but they fail to point to a single meeting or document that requires confidentiality and would be covered by such a privilege, yet would not be covered by the personal privacy exemption or another statutory exemption. In addition, appellees' generalized argument regarding the need of the President "to deliberate with his advisors" in secret, DOJ Br. at 41, has no connection to the members of the ABA Committee, who are not selected by the President and do not even report to him, let alone "deliberate with" him regarding judicial nominees. In fact, since the Committee members simply transmit their ratings to the Chairman by mail or telephone, they do not, as a general rule, even deliberate among themselves.[11]

But even if the Committee arrived at all of its ratings in formal meetings, section 10(e) would still not interfere with its work. The provision simply provides that "[t]here shall be a designated officer or employee of the Federal Government to chair *or* attend" meetings of advisory committees. 5 U.S.C. App. II § 10(e) (emphasis added). The Senate Report stressed that this provision was "not intended to be used to restrict or interfere with the legitimate functions of advisory committees," but was primarily designed to "guard against possible antitrust violations and conflicts of interest." Source Book at 167.

In accordance with section 10(e)'s language and purpose, appellees could easily devise methods of holding meetings without exposing the Committee's deliberations on prospective nominees to a Justice Department employee. For example, *any* federal employee could be appointed as the designated federal officer — such as an employee of GSA who has expertise in the requirements of FACA, but has no interest in, or knowledge of, the judicial nomination process. There is no hint in the record or appellees' briefs that the mere presence of such an employee would interfere with the Committee's deliberations, particularly if the employee made a commitment not to divulge the deliberations to anyone else. And if even that was not sufficient to allay the ABA's concerns, appellees could presumably adopt an arrangement under which the federal employee would be present for the beginning of the meeting — to ensure that the Committee intended to discuss matters that could properly be closed to the public — but would not be in the room during deliberations on prospective nominees. That would certainly comport with Congress' intent, but would avoid any conceivable interference with the Committee's work.[12]

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[11] In contrast, numerous high-level advisory committees, whose members are selected by and report directly to the President, hold open meetings under FACA, including the President's Commission on Federal Ethics Law Reform, which recently released its report and recommendations. If these Presidential commissions can comply with FACA's requirements without a general deliberative process exemption, it is difficult to see how the absence of such an exemption can create a constitutional barrier to the application of FACA to the Justice Department's use of the ABA Committee.

In the final analysis, it is evident that appellees are not complaining that any of FACA's provisions would *necessarily* interfere with the advisory arrangement at issue here, let alone that all of them would do so. Indeed, in 1973 and 1974, OLC concluded that FACA could be applied to the Committee "*without impairing its present efficiency and effectiveness*," *Memorandum from OLC to Deputy Attorney General*, at 9 (May 23, 1973) (emphasis added), and that "*coverage by the Act would have relatively little practical effect upon the Committee.*" Summary Statement at 6 (emphasis added). Thus, appellees' arguments ultimately amount to little more than that they simply do not want to comply with the same basic procedural standards and safeguards that are routinely followed by hundreds of other advisory committees that are functionally identical to the ABA Committee. That is not a "'compelling constitutional reason[]'" to "'invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President . . ..'" *Mistretta v. United States*,___U.S.___, 109 S. Ct. 647, 661 (1989), quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (opinion concurring in the judgment).

CONCLUSION

For these reasons, the judgment below should be reversed.

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[12] The ABA's assertion that FACA would "permit a government official to shape the content of the views of the ABA Committee," and "adjourn meetings as soon as undesirable views are expressed," ABA Br. at 42, contradicts the express language of the Act. Section 5(b)(3) declares that federal officials must take all necessary steps to "assure that the advice and recommendations of the advisory committee *will not be inappropriately influenced by the appointing authority . . . but will instead be the result of the advisory committee's independent judgment.*" 5 U.S.C. App. II § 5(b)(3) (emphasis added).

Respectfully submitted,

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REPLY
BRIEF

FOR ARGUMENT

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No. 88-494
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT WASHINGTON LEGAL FOUNDATION

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REPLY BRIEF FOR APPELLANT WASHINGTON LEGAL FOUNDATION

INTRODUCTION

Appellant Public Citizen's Reply Brief presents arguments with which appellant Washington Legal Foundation essentially agrees. Consequently, in the interests of judicial economy, appellant will not repeat all of those arguments in its reply, although to some extent there will necessarily be an overlap of views.

With respect to the issue of standing, we of course agree with the Department of Justice that we have standing under the Federal Advisory Committee Act, 5 U.S.C. App. II, (FACA) to raise the issue of the denial of access to records and meetings of the ABA Committee. DOJ Br. at 14. While we believe that we have standing to raise other claims under FACA as well, it is unnecessary to resolve that issue because, as Public Citizen correctly points out, "a finding that appellants have rights under any provision of the Act requires resolution of the threshold question of whether the Department's use of the ABA Committee is subject to the Act at all...." PC Reply Br. at 5.[1]

---

[1] DOJ suggests that we would have standing to challenge DOJ's failure to comply with other provisions of FACA in addition to the denial of documents and access to meetings if we alleged that "any member of [our] organization[ ] would have been nominated for the federal bench had the ABA Committee not been rendering confidential advice to the President." DOJ Br. at 15. While the facts show that the ABA renders advice only to the Assistant or Deputy Assistant Attorney General of the Office of Legal Policy rather than to the President, *see* Matthews Decl. ¶¶ 7-10 (J.A. 21-22); 28 C.F.R. 0.23(d), we are nevertheless prepared to make such allegation in an amended complaint if necessary since at least two members of appellant's advisory board, Professors William F. Harvey of Indiana University School of Law and Professor Lino Graglia of the University of Texas Law School, were adversely considered by the ABA Committee for circuit court judgeships. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). If need be, unsuccessful candidates can also be named as individual plaintiffs.

The ABA argues that since appellants recognize that FACA's exemptions from disclosure might be applicable with respect to certain documents or meetings, we lack standing because the redressability prong of standing is allegedly unsatisfied. ABA Br. at 15-16. The ABA is obviously confusing the concept of redressability with the relief a litigant may or may not obtain after litigation on the merits. In any event, there are certainly some documents (or segregable portions thereof) or meetings held by the ABA Committee which would not interfere with appellees' claim for confidentiality in individual cases, such as meetings with the Attorney General to discuss general matters about ABA Committee procedures and the proper evaluative criteria to be used.[2]

Accordingly, this case is in a proper posture for its adjudication on the merits. Appellant will focus on the two main issues presented in this case, *i.e.*, the statutory coverage of FACA and the separation of powers.[3]

---

[2] *See, e.g, Wall Street Journal*, Feb. 6, 1989 (Attorney General's meeting with ABA Committee to discuss its role and to express concerns about improper investigative conduct).

[3] As for the ABA's First Amendment argument, we agree with DOJ that the ABA has no First Amendment right "to engage in a confidential relationship with the government." DOJ Br. at 46, n. 52. Resolution of this issue is more appropriate in the district court since that court has not had an opportunity to pass on the issue. For an excellent article concluding that the ABA Committee is covered by FACA, and that neither the separation of powers nor the ABA's First Amendment rights would be violated, see Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 Colum. L. Rev. 550(1989). Page proof copies of the Note have been lodged with the Clerk's Office and served on all parties and *amici* with this reply brief. Published copies will be available later this month.

I. THE ABA COMMITTEE IS AN ADVISORY COMMITTEE UNDER FACA.

As a preliminary matter, appellant believes that a proper understanding of this case requires a clear presentation of the facts. However, briefs by the Department of Justice and the ABA contain a number of ambiguous, misleading, and inconsistent statements from the very beginning.[4] One of the more curious statements in DOJ's brief is the following:

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[4] For example, in the second sentence of its brief, DOJ states: "In deciding on [judicial] nominations, the President relies on advice from a federal judicial selection committee composed of several officials at the White House and the Department of Justice." DOJ Br. at 2. However, the record evidence, to the extent that there is any in this case, supports the more accurate assertion in our opening brief that this "committee does not, as a committee, advise the President of anything, but only pre-selects potential candidates for *DOJ's* investigation and consideration." WLF Br. at 6, n.3 (emphasis added); *see* Matthews Decl. ¶ 7 (J.A. 21). DOJ also asserts that "Presidents have often decided not to nominate a person who received an unqualified rating from the ABA Committee...." DOJ Brief at 4. Again, the record shows that the President does *not* make any such decision. Rather, the Attorney General is the individual who decides whether to recommend to the President a person who receives an initial unqualified rating from the ABA. *See* Matthews Decl. ¶ 11 (J.A. 22); Def. Statement of Material Facts, ¶ 7 (J.A. 35). Consequently, contrary to what DOJ implies, the President is not likely to be aware of the negatively rated candidate, and hence, makes no affirmative "decision" not to nominate that person.

As demonstrated in our brief, this category of ABA-"vetoed" candidates is significant since there is no opportunity for public scrutiny via Senate confirmation hearings of that aspect of decision-making process. Appellees' separation-of-powers argument is also weakened since, under these circumstances, no advice or recommendation from the ABA ever reaches the President. If a final rating is given to a candidate, the ABA unequivocally states that it discloses to DOJ "*only* the rating.... Neither the contents of the Circuit member's report nor the contents of any of any of the interviews or other background information are disclosed." ABA Br. at 4 (emphasis added). Yet DOJ admits, that the "reasons for the final rating are sometimes revealed" to DOJ, which logically would include information from the ABA committee reports. DOJ Br. at 4. These and other inaccuracies underscore appellant's argument in its opening brief, WLF Br. at 44-45, that if there is any doubt about FACA's applicability in this case, it would be more appropriate to remand for further fact-finding rather than to rely on secondary sources and self-serving statements as a basis for striking down an Act of Congress as unconstitutional.

> Since 1974, the Attorney General has formally taken the position that the ABA Committee is not governed by the FACA. Accordingly, neither the Department of Justice nor the ABA has followed the Act's requirements in connection with the process of advising the President on potential nominees for the federal branch [sic].

DOJ Br. at 7. In the first place, it is not clear what DOJ means by its claim that the Attorney General "has formally taken the position" that the ABA is not covered by FACA. Nor is it clear in what manner this position has been "formally taken" by all the subsequent Attorneys General since 1974.

The mystery seems to have been cleared up on March 28, 1989, when DOJ lodged with this Court a remarkable and revealing set of DOJ memoranda and letters to the ABA from 1973-74. Those documents make it abundantly clear that the Attorney General and other officers of the Justice Department had throughout 1973 and most of 1974 "formally" concluded just the opposite, namely that FACA did indeed apply to the ABA Committee's advisory role with DOJ, and that the application of FACA to the ABA would not unduly interfere with the screening process. It was only after the ABA threatened to discontinue providing advice to DOJ if it were required to comply with any aspect of the law that DOJ "backtracked from [its] former position" and concluded that FACA does not apply to the ABA because of a perceived problem with separation of powers. *See* Memorandum from Assistant Attorney General Scalia to the Attorney General (October 7, 1974); Letter from Attorney General William Saxbe to William Reece Smith, Jr., Chairman of the ABA Committee (October 9, 1974).

The first "formal" position of the Attorney General on the matter was succinctly expressed in a letter dated February 25, 1974, from Attorney General Saxbe to the Chairman of the ABA Committee. That letter states in relevant part:

> In my opinion, as a matter of statutory construction, the position set forth in the May 23, 1973 memorandum of the Office of Legal Counsel is correct. That is, the Committee is subject to the Act to the extent that the Committee is engaged in the function of providing judicial qualification ratings to the Department of Justice. A memorandum summarizing our reasons and our response to the memoranda of [the ABA's] Mr. Klitgaard and Mr. Walmsley is enclosed.
>
> A charter complying with subsection 9(c) of the Act must be prepared for the Committee, but generally speaking coverage by the Act should have little practical effect upon the Committee. We will defer preparation of the charter until you have responded to this letter, but we request that you respond at your early convenience. If as a policy matter the Committee does not wish to accept coverage by the Act, we suggest that you seek an appropriate amendment to the statute. In the meanwhile, we will be happy to cooperate with you in achieving compliance with the Act.[5]

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[5] Despite the fact that in early 1974, the formal position of the Attorney General was that the ABA Committee is covered by FACA, and despite the obvious controversy that surrounded the matter in 1973-74, the ABA Committee informed counsel for appellant that "It has been generally recognized *since 1972* that our Committee is not covered by the provisions of the Federal Advisory Committee Act." *See* Letter from Robert B. Fiske, Jr., Chairman of the ABA Committee to Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation (November 27, 1985) (emphasis added) (J.A. 19).

This letter and the three memoranda attached to it remarkably track the very same arguments appellants have advanced in the court below and in this Court.[6] They show that DOJ itself recognized that the plain meaning of the word "utilized" encompasses the ABA Committee, that application of FACA to the committee would not unduly disrupt its activities since most of its business is done via telephone and mail which is exempt from FACA coverage, and that exemptions (such as 5 U.S.C. 552(b)(6) dealing with personal privacy) could be invoked to keep meetings closed.

* * *

The lower court held, as appellants have argued, that the plain meaning of the word "utilized" clearly encompasses the relationship between DOJ and ABA. In response, DOJ attacks the "plain meaning" rule, claiming that it is merely "an axiom of experience than a rule of law" (quoting Justice Holmes in *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928). DOJ Br. at 21-22. Applying the commonsense dictionary definition of the word "utilized" would, according to DOJ, give FACA "an astonishing reach" not intended by Congress. DOJ Br. at 20. But DOJ would have this Court ignore the plain meaning of the word "utilized," the GSA regulations that interpret and reasonably limit the reach of FACA, and the logical notion that the ABA Committee is an advisory committee, and instead give "utilized" an astonishingly restrictive meaning. DOJ urges this Court to carve out of the statute an arbitrary exemption for all advisory committees that do not receive federal funds, and that advise the President -- and presumably any government

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[6] Summary Statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel; Memorandum from Mr. Dixon to Edmund W. Kitch, Special Assistant to the Solicitor General (Dec. 7, 1973); and OLC Memorandum (May 23, 1973).

employee -- on the exercise of any exclusive Presidential power, such as appointments, pardon, veto, and the like.

The ABA and its supporting *amici* take the additional position that the word "utilized" should apply only to those committees "established by or for the federal government." ABA Br. at 22; People For the American Way Br. at 13. And since the ABA Committee was established in 1946 but not utilized by the Executive until 1952, it was not "established...for the federal government" in 1952 and hence, is not covered by FACA. Both of these statutory arguments are meritless.

A. With respect to the ABA's statutory argument, it is remarkable that it makes its judicial debut in this Court.[7] While it is certainly free to raise this argument on appeal, the ABA, which unsuccessfully made this argument to DOJ in 1973, apparently did not think enough of it to raise it in the district court. This Court should not think much of it either.

While it is true, as the ABA points out, that the word "utilized" was added in the Conference Report on FACA, the ABA's attempt to ignore the plain meaning of the word and limit that phrase to committees "directly established by or for the federal government" is not endorsed by the DOJ, the very agency which is charged under FACA with applying its terms to its own advisory committees. Indeed, it was expressly and persuasively rejected by DOJ in 1973-74:

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[7] In *Washington Legal Foundation v. ABA Standing Comm., On Federal Judiciary, 648 F. Supp. 1353 (D.D.C. 1986) (WLF I)*, the ABA filed a lengthy motion to dismiss WLF's complaint, but gave no hint or suggestion of this statutory argument. *See ABA Motion to Dismiss* (filed Feb. 21, 1986). Rather, the ABA only argued that it was not an advisory committee under FACA and GSA regulations because the ABA Committee 1) deals with "personnel rather than policy matters," 2) "is not a preferred source of advice", and 3) "does not provide advice or recommendations." *Id.* at 34-41.

Our Office has prepared a previous memorandum examining the legislative history and meaning of the term "utilized" and its treatment in the OMB-Justice Guidelines. That memorandum includes a list of significant factors to be considered in determining whether a committee is being utilized for advice by an agency. Included are the following: the purpose for which the committee was created, the initiative for dealings between the committee and the federal agency, the purpose of the federal officials in dealing with the committee, and the nature and frequency of the dealings. Applying these standards to the ABA Committee, it is clear that it is utilized by the Department within the meaning of the Act.[8]

The OLC memorandum to the Solicitor General's Office (December 7, 1973) further demonstrates the flaws in the ABA's argument that the pedigree of its committee is determinative of FACA's coverage:

> A major purpose of the Act is disclosure of the identity and operation of committees intimately involved in advising the Government, and the Act applies both to committees established by an agency and to committees utilized by an agency. Hence, the relevant inquiry concerns the operation of a committee, *not just the circumstances of its birth.* As explicitly stated in the revised guidelines, the initial reason for a group's establishment is just one factor to be considered in determining the scope of the "utilization" concept.

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[8] OLC Memorandum 4-5 (May 23, 1973). The standards referred to in the OMB-Justice Guidelines are similar to those promulgated by the GSA. 41 C.F.R. Subpart 101-6.10.

Id. at 3 (emphasis added).[9] But even if one were to accept the ABA's crabbed interpretation of "utilize" to encompass only those advisory committees "directly established by or for" a government agency, the ABA Committee would nevertheless satisfy that test. FACA defines an "advisory committee" as any "committee... panel, task force, or other similar group, or any subcommittee or other subgroup thereof...which is...established or utilized by one or more agencies...." FACA, §3(2)(C). Thus, while the full ABA Committee may technically have been established in 1946 to advise the Senate, as opposed to the Executive, which began utilizing it in 1952, the facts show that every time the Justice Department considers a candidate for a judicial post, the candidate's name is not provided to the ABA Committee as a whole, but only to the relevant ABA Circuit member and the ABA Committee chairman. ABA Br. at 3. This committee of two is indisputably a subcommittee or subgroup that advises the Department of Justice during the crucial preliminary rating stage of the evaluation process *before* the rest of the ABA

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[9] The memoranda goes on to note correctly that Executive Order 11,007 (1962) and 11,671 (1972), the predecessors to FACA, expressly excluded advisory groups composed wholly of "charitable, religious, educational, civil, social welfare, or other similar nonprofit organizations." Congress was obviously aware of this broad exclusion when it considered adopting FACA, but did not continue that exclusion in enacting FACA. If the Court were to adopt the ABA's and PAW's argument that coverage under FACA is determined by whether the private committee was first established for the executive branch, then FACA would not apply to any industry or trade group or committee that was initially "established" one day to advise Congress or a state government about a particular policy or issue, and then "utilized" the next day (or week or year), on a consistent basis by the executive branch of the federal government for advice on the same or similar policy. The language and purposes of FACA simply do not support such a gaping loophole in the statute that the ABA and PAW would have this Court create.

Committee gets involved in the process, if it ever does. *See* ABA Br. at 3-4.[10]

These "subcommittees" were certainly not established in 1946, but were established for and are utilized by DOJ each and every time a candidate's name is considered by DOJ. Accordingly, the word "utilized" would encompass the work of the ABA Committee even under the ABA's artificially narrow definition of it. *See National Anti-Hunger Coalition v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 771 F.2d 1071, 1075-76 (D.C. Cir. 1983)("task forces" of committee which reports "directly to federal decision makers" may very well lead a court "to conclude that the task forces themselves [are] subject to the requirements of the FACA").

B. The DOJ's statutory argument is as meritless as the ABA's. DOJ ignores the plain meaning of the word "utilized" and argues that its meaning should instead be understood solely with reference to two factors arbitrarily chosen by DOJ from the many factors which may have motivated some members of Congress to vote for FACA: 1) whether the advisory committee receives federal funds, and 2) whether the committee is exerting undue influence on an agency that may affect the interests of the committee. DOJ Br. at 23, 27. DOJ attempts to justify its departure from the plain meaning

of the statute because the plain meaning "'yields results so manifestly unreasonable that they could not fairly be attributed to [legislative] design.'" DOJ Br. at 21 (quoting *United States v. Rutherford*, 442 U.S. 544, 555 (1979). If anything is "manifestly unreasonable," it is the contrived and implausible conclusion that the ABA Committee is not "utilized" as an advisory committee by the DOJ when all of the characteristics of its advisory relationship with DOJ admit of that conclusion. Neither the DOJ nor the ABA is able to point to any "*clearly expressed* legislative intent to the *contrary*", *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added) that might justify a departure from the plain meaning of the text of the statute. In any event, the two arbitrary criteria selected by DOJ to place a limiting construction on "utilize" are misplaced as outlined in our opening brief. WLF Br. at 21-26.

1. FACA by its own terms applies regardless of whether federal money is expended. *See also* S. Rep. No. 1098, 92d Cong. 2d Sess. 8 (1972)(FACA applies "whether or not Federal money is expended"). The goal of public disclosure explicit in the terms of FACA would be easily thwarted if advisory committees not receiving public funds, but nevertheless influencing the governmental decision-making process, were deemed exempt from FACA's coverage.

2. DOJ's second claim, that courts should limit FACA to those advisory committees that have a stake in the agency decisions they try to influence, unreasonably ignores the prophylactic purpose of the law. As more fully explained in our opening brief, the ABA is a special interest group that obviously *does* have an institutional interest in the composition of the federal judiciary. WLF Br. at 22. The ABA, as an institution, takes highly controversial positions in court, and lobbies Congress on issues that are before the courts. Furthermore, the ABA is composed of lawyers

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[10] Depending upon the particular case, this pre-screening subcommittee may consist of more than two members. As recounted by Edward C. Schmults, former Deputy Attorney General during the stormy confirmation hearings for J. Harvie Wilkinson:

> At another meeting, again on a Saturday morning, I met . . . with four members of the ABA committee and they outlined their concerns about a candidate the Department was considering. I agreed with them that their concerns were disqualifying and stated at the meeting that the administration would not proceed with the candidate. Another candidate was selected.

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who seek court-awarded attorney's fees and who can be disciplined by federal judges.

Surprisingly, DOJ cites in its own brief an excerpt from the Senate Report on the FACA that "[t]he lack of public scrutiny of the activities of advisory committees was found to pose the danger that *subjective influences not in the public interest* could be exerted on the Federal decisionmakers." DOJ Br. at 26 *citing* S. Rep. No. 1098, 92d Cong., 2d Sess. 6 (1972)(emphasis added). This concern clearly exists with respect to ABA Committee. As noted in our opening brief, the ABA, which purports to use objective criteria in evaluating judicial candidates, has in fact resorted to investigating the political, ideological, and even religious beliefs of candidates -- hardly factors that admit of objective assessment.[11] Negative ratings that are based even in part on such factors exerts an inappropriate "subjective influence" on DOJ officials. The ABA Committee has made its influence clear when it admits that it will "oppose[] the nomination" of negatively rated candidates. ABA Br. 5 at n.3.

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[11] The ABA has not denied any of the examples cited in WLF's brief outlining the abuses and irregularities in the ABA's investigative procedures, its conflicts of interest, and its consideration of political, ideological, and religious beliefs. WLF Br. at 7-9, 14. Yet another example of the ABA's probing a candidate's religious beliefs has recently come to light. *See Legal Times*, April 3, 1989 at 1, col. 3. Arthur Schwab, a respected litigating partner in the Pittsburgh firm of Reed, Smith, Shaw & McClay, was rated "unqualified" for the federal bench after the ABA inquired into his practice of sending his children to private Christian schools. *Id.* The ABA's feathers were also apparently ruffled when it appeared to them that expressions of support for Schwab constituted "lobbying" for the judicial post. *Id.* at 12. Amazingly, the only response by the ABA to these investigatory abuses is its expression of concern that FACA may force the ABA "to change" its noxious practices. ABA Br. 12. We hope FACA does just that. At a minimum, however, since the ABA itself regards its screening procedures as "a responsibility involving the public trust," *ABA Journal*, Nov. 1986 (statement of ABA President Eugene Thomas) the public is entitled to know whether the ABA screens judicial candidates for their professional qualifications and skills, or whether such investigations include wholly improper or extraneous inquiries into the candidate's religious, political, or ideological beliefs.

The DOJ concludes its strained statutory argument by admitting that, "The interpretation of the FACA that we propose here [to exempt all advisory committees which receive no public funds and which advise the Executive on the exercise of Presidential powers unrelated to 'the implementation of congressional policy,' DOJ Br. at 28] does not purport to resolve all the difficult questions that may arise; any such effort would be premature and inappropriate." DOJ Br. at 31. Appellant submits, however, that DOJ's proffering of this interpretation is itself "premature and inappropriate" since FACA has not yet been applied to the ABA.[12]

II. APPLYING FACA TO THE ABA COMMITTEE WOULD NOT VIOLATE THE SEPARATION OF POWERS.

DOJ argues that applying FACA to the ABA Committee's advisory role with DOJ would violate the President's nomination power because, 1) private parties "might" be reluctant to express unpopular views about the candidate to the ABA Committee, 2) having a federal official attend ABA Committee meetings "might" deter committee members from expressing themselves, and 3) applying FACA "could" lead the ABA Committee to withdraw from the evaluation process altogether. DOJ Br. at 40-41. The very speculative manner in which DOJ's argument is cast only serves to highlight the impropriety of prematurely striking down an Act of Congress before it has had a chance to operate, especially where it appears that FACA can accommodate these imagined fears.

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[12] DOJ's proposal to exclude from FACA's coverage only those that involve "exclusive" Presidential powers is unprincipled. The President's Article II Commander-in-Chief powers are exclusively his, as well as his power to "take care" to faithfully execute the laws. Even if one were to accept DOJ's interpretation to exclude from FACA coverage only those powers having nothing to do with the "implementation of congressional policy," placing the veto power in that category is curious. It seems clear that the exercise of the veto power has a great deal to do with the "implementation [or not] of congressional policy." DOJ's proposed interpretation simply does not hold up under analysis and would simply lead the Court into unchartered waters.

While DOJ recounts the views expressed by President Washington and other Framers in various diaries and letters on the necessity of confidentiality in the appointment process, DOJ Br. at 33-35, it does not appear from any of those examples that FACA would even apply to those situations, or if it did, that the exemptions in FACA could not accommodate the confidentiality concerns. Strikingly absent in this litigation, however, is any *current* expression of the Executive branch's views as to the affect that FACA would have on the President. One searches the DOJ's Matthews Declaration in vain for any objection to FACA. J.A. 20-22. There is not even a hint in that Declaration as to what, if anything, in the judicial selection process must be kept confidential, or whether FACA would not be able to accommodate whatever confidentiality concerns the Executive may have. Surely, it is not asking too much that, before a Court strikes FACA down entirely as unconstitutional, some record evidence be submitted by the Executive indicating that the President requires the ABA's advice in order to carry out his nomination powers, and that FACA would prohibit him from getting it. In addition, if DOJ wishes to invoke "executive privilege," it must, of course, do so in the proper fashion rather than hint at it. *United States v. Reynolds,* 345 U.S. 1 (1953).[13]

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[13] Indeed, neither the DOJ nor the ABA define precisely what information must be kept confidential. If only the *name* of the source is thought necessary to be kept confidential, that is not a reason why all information provided by that source must remain confidential. If a source provides favorable information about a candidate and expressly waives any confidentiality, there appears to be no valid reason to insist on confidentiality in that situation either. A list of questions that committee members may use in evaluating the candidate or for eliciting information from sources, for example, should also pose no confidentiality concerns. The ABA has publicly released certain information about particular investigations without its functions being impaired. *See Confirmation Hearings* 318-23. There is no reason why similar information concerning other investigations cannot be released as well.

A recent decision by this Court concerning the Freedom of Information Act illustrates the scope of the exemptions found therein, and by reference, in the FACA as well. In *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 57 U.S.L.W. 4373 (March 22, 1989), the Justice Department was successful in persuading this Court that 5 U.S.C. § 552(b)(7)(C) permitted DOJ to withhold the release of Federal Bureau of Investigation (FBI) "rap sheets" containing public criminal records of individuals. While the underlying information on those documents were public, the Court nevertheless held that their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under the FOIA exemption. *Id.*

While the privacy exemption found in 5 U.S.C. § 552(b)(6), the Sunshine Act's analogue to the (b)(6) exemption in FOIA, is the one usually invoked by advisory committees which have personnel screening functions similar to the ABA Committee, the *Reporters Committee* decision nevertheless illustrates the accommodating nature of FOIA, and hence, of FACA.[14] That case is also instructive since the Court was able to differentiate between the varying interests underlying the FOIA request. The Court emphasized that the policy of FOIA "focuses on the citizens' right to be informed about 'what their government is up to,'" as opposed to obtaining information about a private individual. *Id.* at 4380. Similarly, appellants have a right under FACA, at a minimum, to obtain information regarding the procedures used by an advisory committee, such as the ABA, to screen federal judicial candidates.

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[14] *See, e.g.,* President's Advisory Committee on Ambassadorial Appointments, 42 Fed. Reg. 64940 (1977); National Institutes of Health "peer review" advisory committee, 53 Fed. Reg. 49794 (1988).

Even if certain documents or meetings are found to be disclosable under FACA, such a result would not violate the President's nomination power and thereby cause a breach of the separation of powers. DOJ claims that the functional or balancing test in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) is inappropriate here, and that a formalistic approach should be used. DOJ is mistaken since the pardon cases and others cited by DOJ for this proposition are inapposite in this case.

In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) and its progeny, the Court struck down acts of Congress that sought to nullify the legal effect of a pardon conferred by the President. No such usurpation or nullification of any substantive power of the President is caused by FACA in this case. The more apt question to ask with respect to the pardon power is whether *Ex parte Garland* would hold unconstitutional FACA's application to a hypothetical "ABA Defense Lawyers Committee on Pardons" that provided preferred advice to DOJ's Pardon Attorney under 28 C.F.R. Part 1 as to whether applicants for pardons or clemency are worthy of it. We think not.[15] All the more so should FACA not be found unconstitutional with respect to the DOJ's utilization of the ABA Committee regarding applicants for judicial posts, especially where, unlike the the case

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[15] DOJ's position would call into question the constitutionality of laws such as FOIA with respect to the exercise of exclusive executive powers. *See, e.g., Crooker v. Office of Pardon Attorney*, 614 F.2d 825 (2d Cir. 1980); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977)(prosecutor memorandum regarding effect of pardon on future criminal prosecutions disclosable if adopted as a final decision); *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980). It would also call into question the host of laws which specify the qualifications and characteristics of the person to fill the office. *See, e.g.*, 15 U.S.C. § 41.

with the pardon power, the Senate has an express constitutional role to play in the appointment process.

The proper separation of powers analysis is the functional or balancing test which examines the extent to which FACA "prevent[s] the Executive Branch from accomplishing its constitutionally assigned function." *Nixon v. GSA*, as well as whether the Congress has sought to aggrandize its power at the expense of the Executive. *See Morrrison v. Olson*, 108 S.Ct. 2797 (1988). The appellants and the lower court simply come up short in demonstrating how FACA, which would apply only to the input from the ABA Committee and not the other numerous sources of information DOJ claims is used by the President, would prevent the President from appointing individuals of his own choosing, especially where, for almost 150 years, the President was able and, with respect to Supreme Court nominees, is still able, to make excellent judicial nominations without the ABA's help at all. Nor do appellees claim FACA aggrandizes any power in the Congress, nor could they, since FACA's administration is left in the hands of the Executive.[16]

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[16] Both the DOJ and ABA are unable to adequately refute appellant's argument (WLF Br. at 35-36) that the last part of the Necessary and Proper Clause ("to make all Laws which shall be necessary and proper for carrying into Execution... *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" Art. I, § 8, cl. 18) (emphasis added) provides Congress with ample authority to regulate the government's use of trade groups and other committees seeking to influence the governmental decision-making process. The ABA's single sentence response, that "Congress' power under this clause . . . is 'inevitably bounded by the express language of Art. II, § 2, cl. 2,'" citing *Buckley v. Valeo*, 424 U.S. at 138-39 (1976), is particularly weak. ABA Br. at 34, n.37. The ABA has not shown how FACA constitutes a congressional usurpation of the express nominating power of the President as did the law under scrutiny in *Buckley v. Valeo*, where Congress attempted to give itself the actual power to nominate officers.

The DOJ's response to our Necessary and Proper Clause argument is equally superficial. DOJ simply opines that "it would not be 'necessary and proper' within the meaning of Article I, sec. 8, for Congress to enact legislation that so fundamentally intrudes on powers exclusively granted to

While appellants believe that the separation of powers would not be violated if FACA were to apply, this Court need not reach that issue in order to reverse the lower court. In a case that was in a posture strikingly similar to the one at bar, the United States Court of Appeals for the District of Columbia Circuit, in an unanimous opinion, disposed of the matter as follows:

> The Council [on Environmental Quality] contends... that if the [Sunshine] Act is construed to cover its rendition of advice to the President, such application would violate the separation of powers and impair the President's authority under article II, Sec. 2, cl. 1 of the Constitution to require the opinion of executive branch officers. It therefore urges us to construe the Act as inapplicable to that function in accordance with the settled rule that, where possible, a statute should be interpreted so as to avoid constitutional defects. *See, e.g., International Association of Machinists v. Street,* 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961).
>
> For the reasons previously given, we do not think the Sunshine Act properly may be construed as inapplicable to the Council in its function of advising the President. Furthermore, as noted, the Council has not thus far sought to close particular meetings at which such advice is to be deliberated, but has instead sought totally to exempt such meetings from the Act. The constitutional issues thus are posed in an abstract context that is inappropriate for their adjudication. It may be that by closing certain meetings, the Council could avoid possible constitutional problems. We apply the settled rule that federal courts "will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. TVA,* 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring.)

Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C.Cir., 1980).

CONCLUSION

For these reasons, and those expressed in our opening brief, the lower court's opinion should be affirmed with respect to its resolution of the statutory issue, but should be reversed and remanded with respect to the constitutional issue.

Respectfully submitted,

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the President." DOJ Br. at 43, n.47. Yet the DOJ has not demonstrated how FACA "so fundamentally intrudes" on the President's power of nomination, especially where the administration of the law is left in the Executive's hands.

The Necessary and Proper Clause can also be considered as additional authority for FACA to support the Advice and Consent power of the Senate and other powers the Congress enjoys with respect to the judiciary. Congress could reasonably consider it "necessary and proper" to have FACA apply to the ABA Committee to ensure efficiency and accountability, and to expedite the confirmation role by ensuring the integrity of the ABA evaluations. *See generally, Confirmation Hearings, supra.*

AMICUS CURIAE

BRIEF

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Nos. 88-429 and 88-494

In The
Supreme Court of the United States
October Term, 1988

Public Citizen,
Appellant,
v.
United States Department of Justice, and
American Bar Association,
Appellees.

Washington Legal Foundation,
Appellant,
v.
United States Department of Justice, and
American Bar Association,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING APPELLEES

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING APPELLEES

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 87 national and international unions with a total membership of approximately 13,500,000 working men and women. The AFL-CIO is an active participant in the national political process and has a continuing interest in the constitutional and statutory principles governing communications between private groups and elected officials, including the President and his agents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold merits question here is one of statutory interpretation: Does the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA" or "the Act"), prohibit the President, in the process of making nominations to the federal bench, from consulting with the American Bar Association's ("ABA") Standing Committee on the Federal Judiciary, unless the Committee is willing to subject itself to a considerable degree of governmental intervention and supervision.[1]

In our view, such a result would constitute a significant, and very likely an unconstitutional, departure from the traditional understanding that the President is free to consult with his constituents in the exercise of responsibilities of a discretionary and political character. The intention to accomplish such a departure should not lightly be attributed to Congress.

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[1] The Committee consults with the Attorney General acting on behalf of the President, rather than directly with the President. In this context, however, the Attorney General is acting as an agent and advisor to the President with respect to the President's exercise of the appointment power. And where officers such as the Attorney General "act by [the President's] authority, and in conformity with his orders . . . their acts are his acts." *Marbury v. Madison,* 5 U.S. 137, 166 (1803) (Marshall, C.J.).

In this instance, moreover, Congress in fact had much more mundane, traditional, and unquestionably valid objectives in enacting FACA: the prevention of wasteful expenditures of the federal government's funds by the executive branch for the establishment or support of advisory committees, and the prevention of the abuse of such advisory committees by interested private parties to subvert or improperly influence the enforcement of congressionally enacted regulatory schemes.

It is our submission that FACA should be construed to apply in a manner congruent with these expressed concerns of Congress—*viz.*, only (i) where federal funds are spent to maintain or support an advisory committee, or (ii) where an advisory committee's advice or recommendations concern the enforcement or implementation of congressionally mandated policies.

The general statutory language used to achieve the expressed congressional objectives should not be read to reach beyond these objectives to effect a gratuitous interference with the traditional political relationship between the President and his constituents—a result never mentioned, much less intended, by the Congress that enacted FACA. Accordingly, FACA should be interpreted not to apply to the President's, or his agents', consultation with associations of his constituents in connection with the exercise of those of the President's responsibilities that are discretionary and political in character.

The ABA Committee was created by an association of constituents—the attorneys who are members of the organized bar—as part of that associations' efforts to influence its elected political representatives; the committee is not financed by federal funds. And the presidential responsibility here at issue—the nomination of appointees to the federal bench—has throughout our history been understood to be a function as to which the President is subject to constraints only of a political nature. Therefore, FACA should have no application to the President's consultation with the ABA Committee respecting the nomination of federal judges.

In part I of this brief, we show that the language of the Act, taken as a whole, and the Act's legislative history support the interpretation just stated. Appellants' broad reading of FACA to apply to presidential consultations of the kind before the Court would result in unprecedented congressional intrusion into, and regulation of, the heretofore unrestricted political relationship between a President and his constituents. Congress should not be found to have intended such a remarkable departure from the traditional understanding and practice absent a clear expression of that intention. Here the legislative materials disclose no such intention. To the contrary, in enacting FACA, Congress was concerned only with matters well within the realm of traditional congressional regulation: the use of congressionally appropriated funds and the enforcement of congressionally enacted regulatory schemes.

In part II of this brief, we show that the conclusion that FACA was not intended to cover a case such as this is reinforced by an additional consideration. Application of FACA to the President's consultations with the ABA Committee respecting nominations to the federal judiciary would raise a most serious constitutional question. The process of governance established by the Constitution is premised on the political tension that inheres in the relationship between the elected branches of the federal government, which allows for government action within a context protective of individual liberty. For that tension to be maintained at the level the Framers envisioned, each branch must be equally able to compete for political support. Legislation that interferes in the legitimate political relationships between a President and his constituents thus threatens the balance of political power between the legislative and the executive intended by the Constitution.

This Court has repeatedly held that Congress should not lightly be found to have enacted legislation of dubious constitutionality, or to have ventured inadvertently into an area of constitutional concern. Given the serious nature of the constitutional concerns raised by appellants' proffered interpretation of the FACA, and the absence of any indication that Congress meant to legislate in this sensitive area, proper respect for Congress requires a construction that limits FACA's scope to those situations Congress clearly intended to cover: *viz.*, the situations where congressionally appropriated funds or congressionally prescribed policies are at issue.

ARGUMENT

I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE STATUTE

A. The Rule of Construction

Appellants' basic claim is that the "plain meaning" of FACA dictates that, except as to the handful of advisory committees expressly exempted, the Act covers each and every private group from which the President seeks advice of any type on any subject germane to the exercise of any presidential power.[2] This argument is predicated on the language of the definitional provision of FACA, § 3(2):

> For the purpose of this Act—
>
> * * * *
>
> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—
>
> * * * *
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

We have no dispute with the point that "utilize" is a broad term used here without any express limitations and in the disjunctive, and that this language, taken in isolation from the remainder of the Act, is susceptible of the interpretation urged by appellants. But the broad potential sweep of the language used by Congress does not end the inquiry as to how that language is to be construed. Indeed, the very breadth of the language warns against too broad an interpretation. *See Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975) (warning that § 3(2)'s "very broad, imprecise definition . . . is not a model of draftsmanship" and that its "very vagueness and sweeping character" allows inclusion of groups not intended by Congress).[3]

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[2] *See* Brief for Appellant Public Citizen ("PC Br.") at 15-17; Brief of Appellant Washington Legal Foundation ("WLF Br.") at 15-18. See also note 3, *infra*.

[3] Appellants, in order to bolster their contention that this case can be determined under § 3(2)'s plain language, refer to various lower court cases and recent administrative regulations of the General Services Administration. *See* PC Br. at 17-20; WLF Br. at 18-20.

Those materials, far from supporting a "plain language" argument, represent repeated efforts by the lower courts and the agencies to cabin the seemingly boundless language of § 3(2). Thus, while arguing "plain language," appellants accept that § 3(2) may have no application "where an agency actively solicits from many

Caution is particularly appropriate here because the broad interpretation urged by appellants would have remarkable and unprecedented consequences. So far as our researches show, in our constitutional history, Congress has never sought to intrude upon the President's ability to consult with his constituents on matters over which the President has discretion to act subject only to constraints of a political nature. We digress for a moment —foreshadowing Part II of our argument—to note the significance for present purposes of that aspect of the President's office.

To a large extent, the duties of the President are defined and circumscribed by Congress. Article II, § 3 of the Constitution requires the President to "take care that the laws be faithfully executed," a requirement that covers the laws enacted by Congress. The consequence of that duty is that the President often serves in effect as the agent of Congress. Moreover, under Article I, § 9, cl. 7, the President is dependent on Congress for the appropriation of the funds he may need to accomplish many of his objectives.

But the President is in no wise a mere agent or dependent of Congress. The President is the elected and politically responsible head of the executive branch. As

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outside institutions," PC Br. 17, where the committee has no "preferred" status, PC Br. at 18, WLF Br. at 19, where the agency does not "lean[] strongly" on the committee, PC Br. at 19, where meetings are on an "ad hoc" basis, *id.* at 20, or involve no "request[s] for specific recommendations on a particular matter." *Id.* But appellants do *not* explain where any of those limitations is found in § 3(2)'s language.

The administrative regulations cited, which were adopted 15 years after the statute, are, moreover, entitled to little deference. *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976) (refusing to defer to regulations promulgated 8 years after enactment). And, none of the court cases cited confronted questions analogous to those presented here.

Thus, the salient point here is that these sources demonstrate that all have recognized that § 3(2)'s vague and broad language must be subject to some limits not gleaned from the dictionary.

such, he has independent political status equal to that of Congress, and he is intended, under the constitutional design, to serve as a political counterweight to Congress. Apart from his responsibility to execute laws enacted by the Congress and his dependence on Congress for appropriated funds, there are numerous areas where the President may act independently, with unbounded political discretion—*viz.*, where his discretion is subject only to the constraints of the political process. The initiation of legislative proposals, Art. II, § 3, the exercise of the veto power, Art. I, § 7, cl. 2, and the nomination of appointees to certain federal offices, Art. II, § 2, cl. 2, are the most pertinent examples. The function at issue here —the nomination of appointees to the federal bench— has long been understood to be an exercise of this kind of presidential discretion.

Throughout our history an important incident of the President's political role has been the freedom of the President to consult with constituents, and with groups of constituents, as the President may deem appropriate, including those with a strong interest in the outcome of the particular presidential decision under consideration. Only through such consultation can a President remain responsive to his constituencies and build the coalitions that are essential to his political efficacy.

The President's consultations with the ABA must be understood in this context. The ABA, a private association of attorneys, has chosen to form a select group to reflect and assert the ABA's views on prospective nominees or nominees for the federal bench: the ABA Committee. *See generally* J. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection*, 49-81 (1965) (tracing history of the ABA's and the Committee's involvement in judicial selection). The ABA Committee was thus not established by or at the request of the government, and the Committee receives no financing from the government. It is a private organization, representing a segment of the electorate wishing to communicate its views as to how the Chief Executive should exercise his political discretion. And it is a group whose views the President evidently values, whether for political or for other reasons. The Committee is in other words a classic example of a private constituent group.

The ABA and its Committee are, accordingly, in the same posture with respect to coverage under the FACA as myriad private groups in our society, established and maintained without government involvement, to whom a President may—and often does—turn in making decisions of a political nature. Thus, for example, in making nominations to particular federal offices, in determining particular legislative initiatives, or in making particular veto decisions, a President may consult with representatives of political parties, business associations, labor organizations, anti-abortion or "pro-choice" groups, or consumer, environmental, educational, veterans, religious, or civil rights groups, and on and on.

If presidential consultation with the ABA Committee subjects that Committee to the government intervention required by FACA, then similar consultations with committees from these other constituent groups would equally lead to FACA coverage. Thus, for example, under appellants' view of the statute, a President's consultation with committees of his political party (*e.g.*, the Republican National Committee) respecting a judicial nomination—or, indeed, any public policy issue—would render those groups "advisory committees" subject to FACA.

The radical nature of this result can be seen in the consequences of FACA coverage for the affected private groups. Far from trivial, these consequences intrude into the very core of the groups' associational integrity and freedom. At a minimum, a group classified as an "advisory committee," would lose its ability freely to meet, deliberate or determine its own agenda. FACA, § 10(e), (f) (all meetings of advisory committees must be called and chaired, or at least attended, by a government officer or employee, who must have authority to approve agenda and adjourn meetings). And, the group would lose control of all its reports, records, and other papers. FACA, § 8(b) (head of agency will appoint officer who will assemble and maintain all advisory committee reports, records and other papers, and produce them subject to the Freedom of Information Act). Certainly, few private associations would tolerate such intrusions, and the imposition of such intrusions would certainly burden the President's ability freely to consult with such groups. *Cf. Eu v. San Francisco Co. Democratic Central Committee*, —— U.S. ——, 57 U.S.L.W. 4251, 4255 (1989) (fundamental right of association includes association's right "to organize itself, conduct its affairs, and select its leaders").

On the face of things, it would seem unlikely that Congress intended such intrusive requirements to apply to those private groups of constituents—not established by, or at the request of, or financed by, the government—that the President chooses to consult in the process of making decisions committed to the President's political discretion. And as this Court has recognized, Congress sometimes speaks in statutory language so general that the words provide a handle for regulating matters Congress, in fact, had no desire to regulate. These are the situations for the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *The Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

Particularly where applications of a generally worded statute would represent unlikely and controversial departures from traditional understandings on matters of great sensitivity and moment, this Court has required a clear statement in the statute's language or history of an intent to effect such a departure before assuming that Congress intended to go so far. Where there is no such clear statement, as there was not in *Church of the Holy Trinity,* this Court "presume[s] that the Legislature intended exceptions to its language which would avoid results of this character." *Id.* at 461.

Indeed, *Church of the Holy Trinity* is peculiarly in point here, because, aside from the general rule of construction articulated there, that case on its facts presented a problem that, as we establish in succeeding sections of this brief, *infra* at 11-22, is nearly identical to the problem posed here. Thus, the following passage from *Church of the Holy Trinity* has particular relevance for the case at hand:

> The [plain language] construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute. [*Id.* at 472.]

The Court has repeatedly followed this approach, especially in cases involving well-established and sensitive governmental relationships. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass,* 404 U.S. 336, 349 (1971). *See also, e.g., Department of Navy v. Egan,* —— U.S. ——, 108 S.Ct. 818, 825 (1988) (Congress must be specific to intrude into Executive's authority over military); *Heckler v. Chaney,* 470 U.S. 821, 832-835 (1985) (Congress must be specific to deny Executive's enforcement discretion); *Trade Comm'n v. Bunte Bros.,* 312 U.S. 349, 355 (1941) (Congress must be specific to supplant traditional state police powers); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 513 (1940) (same).

It is against this "clear statement" standard that the language of the Act and the relevant historical materials should be measured.

B. The Language of the Act

Appellants have placed the whole weight of their "plain meaning" argument on a single word, "utilize," in the definitional section of FACA. Because the President "utilizes" the ABA Committee for advice, they argue, the Committee is covered. But a fair reading of the Act as a whole leads to the conclusion—confirmed by the legislative history, *infra* at 12-22—that Congress had no thought at all of regulating the kind of presidential consultation here at issue.

Most of the Act's provisions are clearly intended to govern not private groups, in the normal sense, but entities having an official status, whose existence arises and depends on government actions. Thus, the Act provides that advisory committees are not permitted "to meet or take any action" until a charter has been filed stating, *inter alia,* their "official designation" and "objectives," "the period of time necessary . . . to carry out [their] purposes," "the agency responsible for [their] support," their "estimated annual operating" budget, and their expected "termination date." § 9(c). And, the Act requires that all advisory committees "in existence" on the Act's effective date, "shall [be] terminate[d] not later than" two years after that date. § 14(a)(1).

Indeed, virtually all of the Act's requirements—for example, those providing for detailed oversight of advisory committee activity by Congress, § 5, the Administrator of General Services, § 7, and the relevant agency heads, § 8; those requiring Federal Register notices before meetings and detailing required meeting procedures, § 10; and those creating a depository in the Library of Congress for all committee reports, § 13—reflect that this is a scheme to govern entities working within the government's administrative processes, and not to govern private constituent groups consulting with their elected representatives on matters of a political and discretionary nature.

Nowhere in the Act's operative provisions is there even one word reflective of any concern for, or sensitivity to, the issues that regulating such consultations would raise. Certainly, there is nothing on the face of the Act that provides the "clear statement" of intention that this Court should require in order to find that the activities in this case were meant to be regulated. See *supra* at ——.

C. The Legislative History of the Act

FACA, as finally passed and signed into law in 1972, was the product of over 15 years of congressional inquiry into the executive branch's uses and misuses of "advisory committees." A review of this lengthy history demonstrates that at no point did Congress see its regulations as affecting the traditional practice whereby Presidents consult with private interest groups prior to making those decisions for which the President has independent political discretion. Indeed, the legislative record reflects that everyone concerned—in Congress and in the executive—saw advisory committee regulation as a conventional addition to the body of established administrative law, reflecting conventional legislative concerns.

1. H.R. 7390, passed by the House of Representatives in 1957, was the first legislative attempt to regulate executive branch "advisory committees." [4]

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[4] Subcommittee of the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., Federal Advisory Committee Act Sourcebook: Legislative History, Texts, and other Documents (Committee Print

The bill resulted from an extensive government-wide survey by the House Subcommittee on Executive and Legislative Reorganization on the executive bureaucracy's use of experts, consultants, and advisory committees.[5] This survey revealed that 1700 to 1800 federally-established advisory committees existed in the executive departments,[6] "to a large degree exercis[ing] the same type of advisory functions as those performed individually by . . . consultants." [7] The use of experts and consultants was already highly regulated, but no such regulation existed for "advisory committees." As the bill's author, Representative Fascell, explained:

> The individual consultant . . . usually has the status of Government employees for most purposes and as such is subject to certain statutory and regulatory requirements as to employment, duties, and qualifications [and is] subject to the conflict of interest statutes and other laws and regulations governing the conduct and ethics of Government employees. On the other hand, . . . members of advisory committees are not considered to be employees of the government. They are not subject to any of the laws or regulations which restrict the activities of Government employees, and yet through their advisory functions they are often instrumental in guiding the formation of official Government policy. [Sourcebook at 79 (reprinting comments of Rep. Fascell).]

H.R. 7390, entitled, "a bill to amend the Administative Expenses Act of 1946, and for other purposes," was an effort to cure this perceived anomaly. Drafted in the

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prepared by Congressional Research Service 1978) ("Sourcebook") at 40.

[5] *See* Sourcebook at 4-5. For the results of this survey, see Committee on Government Operations, 84th Cong., 2d Sess., Replies from Executive Departments and Federal Agencies to Inquiry Regarding Use of Advisory Committees (Committee Print 1956) (6 volumes).

[6] Sourcebook at 47 (H.R. Rep. No. 576, 85th Cong. 1st Sess. (1957)).

[7] *Id.* at 79 (103 Cong. Rec. 11247-11266 (1957) (Rep. Fascell).

form of an amendment to the principal statute regulating the federal departments' use of experts and consultants,[8] Sourcebook at 54 (H.R. Rep. No. 576, *supra*), the bill's requirements were designed to allow Congress to monitor advisory committees in order to assure their responsible, effective and legitimate use.[9] As the House Report explained, the bill "will serve to create and maintain a factual record from which Congress may be kept informed and, therefore, may be better able to give intelligent consideration to the possible necessity for further legislation in this area." *Id.* at 48.

H.R. 7390 was passed by voice vote in the House, Sourcebook at 107 (103 Cong. Rec. 11265-11266 (1957)), but no action on the bill was taken in the Senate. Nevertheless, H.R. 7390 has proved to be of continuing significance.

First, almost all of H.R. 7390's requirements and standards were eventually embodied in similar form in FACA. For example, that bill provided that a department could only establish an advisory committee if there was a statute specifically authorizing that action or an administrative finding of need, and the bill required the department to report details of the committee's expected activities, costs, and duration, H.R. 7390, § 15A(a); required that each advisory committee's meetings be convened at the call of, and under the chairmanship of, a federal officer or employee and that the attendance, discussions, and conclusions of each meeting be reflected in full minutes, § 15A(b)(1-3); required the President to

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[8] *See* Administrative Expenses Act of 1946, ch. 774, 60 Stat. 806, as amended.

[9] There had been previous investigations by Congress and the Antitrust Division of the Justice Department into allegations that business leaders serving on advisory committees to regulatory agencies had at times used those committees for exchanges of information in violation of the antitrust laws and for other illegal purposes. Sourcebook at 46 & 48 (H.R. Rep. No. 576, *supra*). The House Report explained that such activities could be better monitored under the standards of the bill. *Id.*

make annual reports on the Executive's use of advisory committees, § 15A(c)(2); and, prohibited advisory committees from engaging in activities that were not solely advisory in nature, § 15A(b)(4). *Compare* FACA, §§ 6(c), 9(a-c), & 10(c, e-f) (containing similar requirements).

Second, H.R. 7390 did not specifically define the term "advisory committee," but its text and the House Report made clear that only groups established by, and given official status within, the executive branch were covered. At the bill's core was the provision that no advisory committee be "establish[ed] in a department," except in conformance with the bill's requirements. H.R. 7390, § 15A(a). And, as already noted, the bill was based on the parallel between advisory committees and experts and consultants, and the recognition that the latter had already been given "the status of government employees for most purposes." Sourcebook at 79 (Rep. Fascell); *see also id.* at 54 (H.R. Rep. No. 576, *supra*). Moreover, as the House Report made clear, one of the purposes of the bill was to mandate that, once established, "advisory committees [were to be] treated as government instrumentalities." *Id.* at 45. No committees privately-formed by constituent groups were discussed.

Third, the bill was entirely focused on the use of advisory committees by agencies administering programs created by federal statutes passed by Congress. *Id.* at 45. No committee advising the President on his performance of functions subject only to political constraints was ever discussed.

2. Congress again expressed concerns regarding advisory committees during the Ninety-First Congress (1969-1970), when committees in both the House and Senate held hearings on the subject. Subsequent to the House's passage of H.R. 7390, the President had issued Executive Order 11007, which adopted many of the requirements of H.R. 7390 as internal administrative policy. Sourcebook at 108 (27 Fed. Reg. 1875 (1962)).

The activities of each congressional committee reflected discontent with the management of advisory committees under the Executive Order. These inquiries led, in the next Congress, to the passage of FACA.

In the House, the Special Studies Subcommittee of the Committee on Government Operations began to study allegations that executive advisory committee practices were wasteful and inefficient. After an elaborate study and survey and five days of hearings,[10] the subcommittee issued a report ("the 1970 Report") finding that, despite Executive Order 11007, advisory committees had remained relatively unmonitored, unregulated, and wasteful.[11] The number of committees had grown to between 2600 and 3000, their cost had become "considerable," and many continued in existence although no longer serving any purpose. Moreover, the useful work of many committees often became lost or irretrievable. The subcommittee's report made 14 specific findings and 20 recommendations, all relating to efficiency and cost concerns. *See* Sourcebook at 214-237.

This inquiry, for the first time, examined presidential study commissions as part of the advisory committee issue. Focusing entirely on issues of cost and management, the subcommittee identified "198 Presidential committees with annual estimated operating costs of nearly $50,000,000." Sourcebook at 223. The 1970 Report explained that "because of [these] significant operating costs Presidential committees were given special attention by the Subcommittee." *Id.* Many presidential committees were unmonitored, mismanaged, wasteful, obsolete or duplicative. Some virtually never met despite having members, budgets, and staffs. Others, in the midst of their activities were disavowed by the White House.

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[10] Hearings before a Subcommittee of the House Committee on Government Operations: Presidential Advisory Committees, 91st Cong., 2d Sess. (1970) (2 volumes).

[11] *See* Sourcebook at 214-237 (H. Rep. No. 1731, 91st Cong., 2d Sess. (1970) ("1970 Report")).

Often after an expensive study, the resulting report was wholly ignored. *Id.* at 224-226. As the subcommittee concluded, through these advisory committees "the Executive Branch wastes very considerable public funds." *Id.* at 225.[12]

In the Senate, the advisory committee hearings had a quite different focus. Senator Metcalf had introduced S.3067, a bill "to amend the Federal Reports Act of 1942 so as to provide for consumer, small business, and labor representation on Budget Bureau advisory committees." Sourcebook at 116 (115 Cong. Rec. 31270-31278 (1969). And, the resulting hearings focused on that bill.

The basic issue raised by S.3067 was the undue influence of interest groups on regulatory policy as a result of the regulatory agencies' establishment of business advisory groups. The Federal Reports Act[13] had required that the Budget Bureau approve all questionnaires that federal regulatory agencies wished to send to the public. As part of its program, the Bureau had requested representatives of business interests to form the Advisory Council on Federal Reports ("ACFR"), whose committees evaluated each suggested form. *Id.* at 116, 126-128. In Senator Metcalf's view, these committees frequently used their official advisory positions to "frustrate the collection and publication [by the regulatory agencies] of information" necessary to pursue proper policies. *Id.* at 124. Moreover, these committees were comprised only of representatives of business intesests, and their meetings were often closed to the public. *Id.* at 126-129.

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[12] It should be emphasized that all of the presidential advisory committees examined by the subcommittee were officially established and federally financed committees. The range of Presidential advisory committees discussed in the report is reflected by the following list: the President's Commission on Campus Unrest (Scranton Commission), the President's Commission on Obscenity and Pornography, the National Commission on the Causes and Prevention of Violence (Douglas Commission), the National Advisory Commission on Civil Disorders (Kerner Commission), the President's Council on Physical Fitness and Sports, and the President's Temporary Commission on Pennsylvania Avenue.

[13] Federal Reports Act of 1942, ch. 811, 56 Stat. 1078.

While Senator Metcalf's bill only applied to the Budget Bureau—prohibiting its use of any "advisory committee" to enforce the Federal Reports Act unless the committee included labor, small business and consumer representatives—the hearings also examined many other advisory committees representing business interests that had been established at other regulatory agencies.[14]

3. Based on the House and Senate hearings in the prior Congress, bills on the regulation of advisory committees were introduced in both the House and Senate in the Ninety-Second Congress.

In the House, Representative Monagan, who had chaired the Special Studies Subcommittee in the Ninety-First Congress, introduced H.R. 4383, which incorporated many of the provisions from H.R. 7390 and most of the recommendations from the 1970 report. After a one day hearing,[15] the bill was reported with amendments to the full House by the Government Operations Committee.[16]

As explained to the House, the bill was designed to eliminate wasteful expenditures and thus save federal funds. As the sponsor put it, the bill would provide for "the efficient functioning of Government agencies, and . . . perform a housekeeping function that is not being performed at the present time." Sourcebook at 293 (118 Cong. Rec. H4272-H4286, (Rep. Morgan).[17] H.R. 4383 also drew on the previous year's Senate hearings: the bill included guarantees of open meetings, and conflict of interest prohibitions for advisory committee members, and, in the brief floor debate, a number of representatives commented on the problems that groups like the ACFR had caused in the regulatory process. *See, e.g., id.* at 306 (Rep. Dingell).

After floor debate in which virtually every speaker favored the bill, it was passed by a large bipartisan margin of 357 to 9.[18] Sourcebook at 291-313 (118 Cong. Rec. H4274-H4286 (1972)). With further amendments in Conference, H.R. 4383 emerged as FACA.

A number of points should be made about H.R. 4383, as passed by the House. First, although the bill explicitly governed presidential advisory committees, treating those and other advisory committees simliarly, the only references to presidential committees in the House Report or on the floor were directed at their costly and inefficient use of federal funds. *See, e.g., id.* at 293 (Rep. Monagan). There were no references to the manner in which the President consults with his constituents regarding his exercise of political discretion.

Second, the bill only governed committees "established by" statute, by the President, or by government agencies. Sourcebook at 301. The debate repeatedly referred to the publicly-financed and "quasi-governmental" status of the groups under consideration. *See, e.g., id.* at 297 (Rep.

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[14] *See generally* Hearings before a Subcommittee of the Senate Committee on Government Operations: Advisory Committees, 91st Cong. 2d Sess. (1970-1971) (3 volumes).

[15] Hearing before a Subcommittee of the House Committee on Government Operations: Advisory Committees, 92d Cong., 1st Sess. (1971).

[16] Sourcebook at 271 (H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972)).

[17] *See also id.* at 294 (Rep. Horton) (goal is "sensible management of the finances"); *id.* at 295 (Rep. Holifield) (committees cost $75 million per year and use over 20,000 federal employees); *id.* at 299 (Rep. Randall) (bill will eliminate waste).

[18] The votes against the bill appear to have been based on the concern that allowing the Office of Management and Budget to monitor the advisory committee practices of the independent agencies would compromise those agencies' independence. All of those representatives who expressed this concern otherwise expressed support for the goals of the bill. *See, e.g.,* Sourcebook at 288 (views of Rep. Moss).

Moorhead). The House Report explained that the term "established by" was to be interpreted as including groups like the ACFR (the business advisory committee to the Budget Bureau), *see id.* at 274, explaining that ACFR "was organized . . . at the request of the Office of Management and Budget." *Id.* at 276.

In the Senate, the Ninety-Second Congress saw the introduction of three advisory committee bills. First, Senator Metcalf introduced S. 1637, which, based on the hearings of the previous year, called for uniform standards requiring open meetings and public membership for all advisory committees. The bill made no reference to presidential advisory committees, referring only to "federal agenci[es]"; and in his floor speech introducing the bill, Senator Metcalf spoke only of committees established by various regulatory agencies. Sourcebook at 132-138 (117 Cong. Rec. 11442-11445 (1971)). Second, Senator Roth introduced S. 1964, which was modeled on H.R. 4383. *Id.* at 139-144 (117 Cong. Rec. 17070-17072 (1971)). And, third, Senator Percy introduced S. 2064, which contained provisions drawn from both S. 1637 and S. 1964. *Id.* at 145-150 (117 Cong. Rec. 19802-19805 (1971)).

Extensive hearings were held again,[19] and a compromise bill, S. 3529, combining features of the Metcalf, Roth and Percy bills, was introduced and reported to the floor. *Id.* at 14-16, 173; *see also id.* at 158 (S. Rep. No. 1098, 92d Cong., 1st Sess. (1972)). With virtually no debate on the merits, the bill was passed by voice vote. *Id.* at 192-213 (118 Cong. Rec. S14644-S14655 (1972)).

Again, nothing in the extensive Senate hearings reflects any inquiry into, or any interest in, the ways in which the President gains advice from interested private groups regarding his independent political decisions. As

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[19] Hearings before a Subcommittee of the Senate Committee on Government Operations: Advisory Committees, 92d Cong., 1st Sess. (1971) (3 volumes).

in all previous hearings and reports, all references to undue interest group influence in the government were in the context of agency enforcement of Congress's statutory policies.

Moreover, in similar fashion to the House bill, S. 3529 applied only to committees "established or organized by" the President or the agencies. *Id.* at 158 (S. Rep. No. 1098, 92d Cong. 1st Sess. (1972)). The Senate Report—like the House Report—explained that this term must be construed to apply to groups such as the ACFR, explaining that the ACFR was a group that was "br[ought] together" by a government officer. *Id.* That comment can hardly be taken to evince an interest in bringing under the bill's coverage privately formed, preexisting constituent groups.

Although a variety of issues were reconciled in conference, the only one of relevance here is the change in the definition of "advisory committee" to include committees "established or utilized by" the President or the agencies. Sourcebook at 316 (H.R. Rep. 1403, 92d Cong. 2d Sess. (1972)). To make clear that this change was intended *only* to expressly cover groups like the ACFR—*viz.*, groups formed at the behest of the government, although not directly by the government—the Conference Report stated that "[t]he Act does not apply to advisory committees not directly established by or for [the] agencies." *Id.* at 324.

The Conference bill was then passed in both chambers by voice vote, with virtually no debate. Soon after its passage, the President signed the bill into law. Sourcebook at 19.

4. The history of the Ninety-Second Congress's consideration and passage of FACA serves to reaffirm the points already made with respect to the treatment of advisory committees by earlier Congresses.

First, no discussion occurred on the floor, in the reports, or in the hearings that would indicate any intent to regulate—or any belief that the bill would regulate—

the President's consultation with constituent groups regarding those of his duties that are of an independent political nature. Indeed, the repeated passage of bills by overwhelming majorities, often by voice votes, with little or no debate, belies the view that Congress intended to limit such a basic and traditional presidential prerogative.

Second, the fact that the Executive never opposed these bills on separation of powers grounds also cuts against an expansive reading of the resulting legislation. Although expressing a preference for leaving advisory committee issues to internal administrative resolution, the Nixon Administration did not provide significant opposition to FACA, and the President signed the bill into law.

Third, the congressional concerns that were stated as requiring a legislative response were of the most traditional type. Congress was motivated, on the one hand, by an interest in reducing wasteful use of congressionally appropriated funds, and on the other, by an interest in protecting the bureaucracy from undue interest-group influence in the enforcement of congressionally enacted statutes. These traditional congressional interests—and not any nontraditional interests relating to regulating the political role of the President—were the interests that clearly motivated the passage of FACA.

In short, there is no indication—much less the kind of clear statement required by this Court's decisions, *supra* at 9-11—that Congress intended FACA to regulate presidential consultations with private constituent groups regarding matters as to which the President is subject to constraints only of a political nature.

II. THE CONSTITUTIONAL CONCERNS

1. As we have just seen, Congress had two specific and limited objectives in enacting FACA: preventing wasteful expenditures of treasury funds for the establishment or maintenance of advisory committees; and preventing interested private parties from using such committees improperly to influence the enforcement of congressionally enacted regulatory schemes. These congressional objectives are well within the range of valid and traditional legislative goals under our constitutional system.

Congress' power to control the expenditure of money from the Treasury by the executive branch cannot be doubted. Article I, § 9, cl. 7, of the Constitution, in unequivocal terms, confers *exclusively* upon Congress the power to appropriate federal funds: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." By constitutional design, the President—and the executive as a whole—are without power to spend any federal monies except upon the advance authorization of Congress. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned [by Congress]." *Reeside v. Walker*, 52 U.S. 272, 291 (1850). *See also Knote v. United States*, 95 U.S. 149, 154 (1877); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); The Federalist No. 58 (J. Madison) (C. Rossiter, ed., 1961) at 359. Such congressional action can not be impeached on any claim of interfering with constitutionally protected presidential prerogatives.

Similarly, Congress acts well within its constitutional role when the Legislature takes action designed to assure that a legislatively enacted regulatory scheme is enforced in a manner insulated from political influences. *See, e.g., Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2597, 2619 (1988); *Weiner v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Kendall v. United States*, 37 U.S. 524, 610-612 (1838). Article I, § 8, cl. 18 clearly grants Congress the power to enact laws protecting the integrity of the administration of its legislation against distortion by such influences. That provision states that Congress has the power:

> To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

And, again, such legislation poses no interference with any constitutional prerogative of the President. The President's function with respect to enactments of Congress is to "take Care that the Laws be faithfully executed." Article II, § 3. The President's task is thus to execute the will of Congress as expressed in each validly adopted statute. The precise nature of the Executive's task in this regard is generally defined and limited by Congress in the terms of the enactment; the degree of executive branch discretion in enforcing or implementing a particular statutory scheme is, therefore, only that which Congress provides. Accordingly, if Congress determines by a proper enactment that advisory bodies that are consulted by government regulatory agencies should be subject to government control and supervision to ensure against the subversion of the law enforcement process, the task of the President is faithfully to execute that congressional determination.

2. Appellants, however, would have it that FACA applies in situations that involve neither of the issues on which Congress focused in enacting the statute: *viz.* that FACA goes beyond situations involving the expenditure of government funds and situations involving the integrity of the enforcement of statutory schemes. According to appellants, FACA applies as well to situations, represented by the case before the Court, where the President desires, on a selective basis, to consult certain groups of constituents in connection with decisions of a discretionary and a political nature. It is at this juncture that a serious constitutional question arises.

The President, as we have stressed, is expected to carry out the will of Congress as expressed in duly enacted legislation, whether or not the President agrees

with either the statutory objectives or the means of enforcement prescribed by the Legislature. And the President is not free, at least with regard to purely domestic issues, to implement significant programs that Congress has not authorized.

In these respects, the President serves very much as the agent of Congress. But that is not the whole of the office.

The President and Congress each have an independent and equal political status. In this regard the President serves as a counterweight and check on the power of Congress. As one commentator has put it, " 'The beginning of wisdom about the American Presidency is to see that it contains both principles [that is, administrative responsibility subordinate to the legislature and political equality with it] and to reflect on their complex and subtle relation." Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 600 (1984) (the bracketed material was inserted by Prof. Strauss in quoting Storing, Introduction to C. Thach, The Creation of the Presidency 1775-1789, at vii (1923)).

Justice Story, in his Commentaries on the Constitution, put the duality in the President's roles in the following terms:

> In the exercise of his political powers [the President] is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive. But he has no authority to control other officers of the government, in relation to the duties imposed upon them by law, in cases not touching his political powers. [J. Story, *Commentaries on the Constitution of the United States*, 579 (Rotunda & Novak ed. 1987).][20]

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[20] Chief Justice Marshall had reflected on this point in his opinion for the Court in *Marbury v. Madison*, 5 U.S. 137, *supra*, at 165-166:

3. The political role of the President thus described is at the heart of the Framers' plan for a government that has sufficient authority to carry out the Nation's business yet is sufficiently constrained to assure against the concentrations of power that might endanger individual liberty. That plan depends on the division of *political* power between the executive and the legislative branches so that the government would have the power to act, while at the same time each branch would have the power to guard against the excesses of the other.

The Framers' affirmative reliance on political competition between the executive and legislative branches is best expressed by Madison, in the Federalist No. 51:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exists, no power to control that discretion. The subjects are political . . . .
>
> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

And the Chief Justice drew the following "conclusion from this reasoning":

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

> To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.
>
> * * * *
>
> But the great security against a gradual concentration of the several powers in the same departments consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition . . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [The Federalist No. 51 (C. Rossiter ed., 1961) at 320-322.]

Madison termed this approach, the "policy of supplying, by opposite and rival interests, the defect of better motives." *Id.*

The strength of this lynchpin of our Constitution depends on the recognition and maintenance of the distinct political powers of the President and the Congress. The Framers conceived of both as representatives of the people.[21] The political power of each branch ultimately rests on the support that branch has among the citizenry. The ability of either branch to act, to persuade the other branch to act, or to check the other branch, is to a large degree dependent upon that branch's ability to accurately reflect, or in turn to marshal, the popular will.

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[21] *See* 2 Elliot's Debates 253 (1859 ed.) (Hamilton in New York ratification convention) ("The President will be himself the representative of the people. From the competition that ever subsists between the branches of government, the President will be induced

Thus, for example, the President assuredly has the power to veto legislation passed by Congress, but the popular will may constrain his exercise of that power, or provide a basis for a congressional override of a veto. Similarly, the President's power to propose legislation, and Congress' power, in the abstract, to enact legislation, are without practical effect if there is no popular support for an initiative. And—as recent events so forcibly remind—the President's appointment power may be checked, or at least influenced, by Congress' power not to confirm, depending on the relative political strength of the two branches.

The Constitution dictates no particular result in these contests of political strength; the process assumes that the result at any time will be a product of the political realities of that time. But the Constitution does require that neither branch be stripped of its ability to function as an independent political actor—and, indeed, as a competitor—in this process.

4. An essential component of political representation is the ability of a politician to consult with constituents with respect to matters to be determined in the political process. In the words of James Wilson, one of the primary framers of Article II of the Constitution: [22]

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to protect [the people's] rights, whenever they are invaded by either [legislative] branch."); 3 Elliot's Debates 240 (1836 ed.) (Nicholas in Virginia ratification convention) ("[The President] is elected by the people at large . . . . If he deviates from his duty, he is responsible to his constituents."); *see generally* C. Thach, *The Creation of the Presidency: 1775-1789*, at 166-168 (1969 ed.).

[22] C. Thach, *The Creation of the Presidency: 1775-1789*, at 176 (1969 ed.) ("to James Wilson belongs the credit of crystalizing the concept [of the Presidency] and laying it before the Convention").

> Representation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of publick affairs. This chain may consist of one link, or of more links than one; but it should always be sufficiently strong and discernible. [1 J. Wilson, Works 430 (1804).]

The defect, from a constitutional perspective, in appellants' broad interpretation of FACA is that the Act so construed threatens to break, or at least to interfere with, the "chain of communication" between the President and his constituents on matters political in nature. Petitioners state that the President may not consult with the ABA Committee on prospective judicial nominees, unless the Committee is willing to submit to an onerous degree of government intrusion in, and supervision over, the Committee's internal processes. *See supra*, at 8-9. Private groups—worthy of that name—confronting the choice of submitting to these government intrusions or declining to consult with the President are likely to choose the latter course.

5. Whether Congress may enact legislation that burdens the President's ability to consult with constituents in this manner is thus a serious constitutional question. In the absence of any evidence that Congress intended FACA to have this effect, this Court should not reach that question.

This Court has repeatedly held that it will "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, —— U.S. ——, 108 S.Ct. 1392, 1397 (1988). Moreover, as a matter of judicial prudence, "constitutional issues [will] not be needlessly confronted" by this Court. *Id.* Based on these two concerns, it is a "cardinal principle" that "the Court will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id. See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929). And it follows necessarily that, where no "plain[] intent" to do so is shown, Congress should not be found to have ventured into an area of serious constitutional concern.

The sum of the matter is this. The Court should construe FACA in a manner congruent with the clear objectives stated by Congress: the scope of the Act should not be extended beyond those situations that involve the use of congressionally appropriated funds or the enforcement of congressionally enacted programs. FACA should not be construed to limit the President, in the exercise of his independent, political functions, from consulting with organizations of his constituents.

CONCLUSION

For the foregoing reasons, the judgment of the district court in this case should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Nos. 88-429, 88-494

IN THE
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Appellant,
v.
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AMERICAN BAR ASSOCIATION,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF PEOPLE FOR THE AMERICAN WAY ACTION FUND AND ALLIANCE FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF PEOPLE FOR THE AMERICAN WAY ACTION FUND AND ALLIANCE FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICI CURIAE[1]

Amicus Curiae People for the American Way Action Fund is a member-based, nonpartisan citizens' organization which seeks to promote and protect civil and constitutional rights, and works to preserve the independence of the federal judiciary. It is the advocacy arm of People for the American Way, which was founded in 1980 by a group of religious, civic, and educational leaders devoted to the Nation's heritage of tolerance and pluralism.

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[1] Written consent to the filing of this brief amicus curiae has been obtained from the parties to this case. Copies of the consent

Since 1985, People for the American Way Action Fund has monitored the nomination and selection of members of the federal judiciary. It has done so in part by conducting research and investigations of nominees and potential nominees.

Amicus Alliance for Justice is a national association of public interest law organizations concerned with issues affecting access to the justice system. Since January 1985, the Alliance has operated the Judicial Selection Project, an ongoing, full-time project to monitor the federal judicial selection and confirmation process. The Project's steering committee is comprised of over thirty individuals representing leading public interest, civil rights, and labor groups. The Project seeks to promote an independent judiciary committed to equal justice, and it encourages the recruitment and nomination of highly qualified women and minorities. The Alliance's Project reviews every nomination to the federal bench by reviewing the cases in which the nominee has participated, legal writings, speeches, and other relevant materials, and by conducting confidential interviews with individuals who know or who have worked with, and opposite to, the nominee.

The staffs of the People of the American Way Action Fund and the Alliance for Justice provide information to the appellee American Bar Association (the "ABA") and its Standing Committee on the Federal Judiciary (the "ABA Committee"). The ABA Committee routinely exchanges information with the Executive Branch concerning judicial appointments. It is particularly well

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letters have been filed with this brief. Although Amici are filing this brief in support of appellees, which include the Department of Justice, Amici's interests differ in some respects from those of the Department, as noted below.

situated to provide advice concerning nominees and prospective nominees. While Amici have often disagreed with positions taken by the ABA, Amici nonetheless recognize that the ABA is the largest and best known professional organization of lawyers in the United States. By virtue of its professional experience and longstanding personal and professional contact with most candidates for the federal bench, the ABA is able to make well-informed judgments about the qualifications of actual and potential nominees. For this reason, the Department of Justice routinely gives the ABA Committee early notice of prospective nominees.[2] Amici recognize that although the ABA Committee process has been subject to criticism, the Committee is nonetheless important in promoting excellence in the federal judiciary.

When investigating prospective nominees, the Committee solicits, receives, and evaluates information from a wide array of sources. These include the candidate's responses to a comprehensive questionnaire developed by the ABA expressly for the Committee's use, and a study of the candidate's legal writings.[3] Since the ABA's establishment of the Committee in 1946,[4] it has also served as a valuable conduit for information and advice provided by others. The Committee conducts interviews with, and receives information from, persons in a position to evaluate the candidate, typically including judges, law professors, lawyers, and others with knowledge of the candidate. All such interviews are confidential.[5]

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[2] The Department began this practice in 1952—more than six years after the Committee came into existence. Annual Report of the American Bar Association, 77 A.B.A. Ann. Rep. 215-17 (1952).

[3] American Bar Association, *Standing Committee on Federal Judiciary—What It Is and How It Works* (1983), JA 43, 47.

[4] D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 83 (1988). The Committee took its present form in 1949. *Id.* The ABA Committee was created by the ABA, not at the request of the federal government. *Id.*

[5] American Bar Association, *Standing Committee on Federal Judiciary—What It Is and How It Works* (1983), JA 43, 46-52. The process also involves an interview with the prospective nominee,

The information provided to the ABA Committee by individuals associated with Amici consists of information concerning particular candidates, as well as the names of knowledgeable individuals familiar with the nominees and willing to provide additional information.[6] The views of these Amici are not always shared by other individuals and groups, and are sometimes controversial. Information has been supplied to the ABA Committee rather than to the Department of Justice because these Amici and similar groups have had interests that sometimes differ from those of the Executive, which routinely supports Administration candidates whose names are provided to the ABA Committee. Some of these candidates have been opposed by Amici. The ABA Committee has always treated such information in strictest confidence, a fact which greatly facilitates the gathering of information. While Amici also may express their views in the context of the Senate confirmation process, that is no substitute for the opportunity to provide views in confidence to the ABA Committee.

While these Amici strongly support application of sunshine requirements to government agencies, they oppose its application here. The ability of Amici meaningfully to participate in the judicial selection process will be directly and adversely affected by any decision which treats the ABA Committee as an arm of the government and subjects it to the regulatory requirements of the Federal Advisory Committee Act.[7]

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who has the opportunity to respond to any potentially adverse information and to provide any additional information bearing on it. *Id.* at 48.

[6] At one time the Alliance for Justice and other groups were routinely supplied with the names of nominees by the ABA Committee to facilitate comment. That practice ceased in 1985. JA 17-19. Amici now secure the names of potential nominees from public and other non-ABA Committee sources.

[7] 5 U.S.C. app. (1982), *amended by* 5 U.S.C. app. (Supp. IV 1986) (the "Act").

In particular, subjecting the ABA Committee to the Act would chill the ABA's internal deliberations and discourage Amici and other citizen groups from participation in the nomination process. Application of the Act would require that the ABA Committee's evaluative meetings be chaired by federal officials, presumably from the Department of Justice,[8] and that the Committee's deliberations—as well as communications of these Amici—be made public unless the Department determines that one of the exemptions applies.[9]

Confidentiality is of crucial importance to the ABA Committee's process. Confidentiality encourages participation by those with knowledge about the candidate, maximizes honest and candid expression about sensitive matters, protects participants from harassment or retribution, and often saves candidates themselves from personal embarrassment. The need for confidentiality is particularly compelling because many of those most knowledgeable about a particular candidate's shortcomings may face the prospect of later appearing before that individual as advocate or litigant.[10] Without any assurances that their candid assessments of judicial candidates would not be disclosed to federal officials, those who now supply information to the ABA Committee would be less willing to do so.

SUMMARY OF ARGUMENT

I.

No reasonable construction of the Federal Advisory Committee Act (the "Act") would render it applicable to the ABA Committee. The statute defines "advisory committee" as including any committee which is "established or utilized" by the President or any agency. The court below read the term "utilized" to cover virtually any group, whether private or public, that receives information from and offers advice to any federal agency, and on that basis held that the Act applied to the ABA Committee.

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[8] *See* Act §§ 10(a)-(c), (e), (f).

[9] Act §§ 10(b), (d), *citing* 5 U.S.C. §§ 552, 552b.

[10] *See In re Petition of Illinois Judicial Inquiry Board*, 128 Ill. App. 3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before.")

Such a reading cannot be squared with the statute's structure and purpose. The Act was designed to prevent the proliferation of advisory committees created by federal agencies. It bars all advisory committees from meeting or taking any action until they have filed a federally-specified charter, and it prohibits advisory committees from meeting under any circumstances except in the presence of a federal official. Congress gave agency officials the powers to regulate the membership of advisory committees and to terminate their existence; to disclose their papers and internal deliberations to the public; and to disclose the communications they receive from persons such as Amici. It is inconceivable that Congress could have intended to subject groups of citizens such as the ABA Committee to such intrusions. The required presence of a federal official and the threat of disclosure of communications by the government would be particularly inappropriate where, as here, positions taken by groups such as Amici may be inconsistent with those of the Executive Branch.

There is no hint anywhere in the legislative history that Congress meant the Act to apply to groups such as the ABA Committee. Indeed, the legislative history shows the contrary. Throughout the legislative history, Congress focused on groups "established" or "organized" or "create[d]" by the federal government. The addition of the term "utilized" to the bill did not occur until the Conference Committee report, and plainly was not designed to materially alter the scope of the Act. The very fact that the Conference Committee gave no explanation for the addition suggests that it was inconsequential. It is apparent from the history of the bill that insertion

of the term "utilized" was meant only to ensure that the Act would cover organizations created by the government before enactment, and that it would cover organizations created by quasi-government agencies such as the National Academy of Sciences. There is no suggestion that groups not created "by or for" the federal government would be covered. The Conference Committee Report made that clear: "[T]he Act does not apply to . . . advisory committees not directly established *by or for* such [federal] agencies." H.R. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972) (emphasis added). Here, neither the ABA nor the ABA Committee was created "by or for" the Executive Branch; indeed, both were organized years before the ABA Committee assumed its present role.

Further and compelling support for a narrowing construction arises from the long-standing principle that, whenever possible, statutes should be read to avoid constitutional questions.

II.

If construed to apply to the ABA Committee, the Act would violate the First Amendment. The Committee's work consists primarily of communications with interested parties, deliberations concerning the qualifications of prospective judicial nominees, and the submission of views to the government. Individuals associated with groups such as Amici supply information to the ABA Committee. All such conduct is entitled to the very highest level of First Amendment protection. The First Amendment plainly protects the rights "to speak freely, to advocate ideas, to associate with others, and to petition [the] government. . . ." *Smith v. Arkansas State Highway Employees*, 401 U.S. 463, 464 (1978) (per curiam). While the government does not seek directly to prohibit activities of the Committee or these Amici, decisions of this Court have long made clear that compelled disclosures concerning the confidential internal deliberations of private groups violate the First Amendment. The Act's provisions—particularly the required presence of a federal official and the prospect of public disclosure and outright termination—would severely chill constitutionally protected rights of expression, association, and petition. The positions of the ABA Committee, and particularly the positions of these Amici, are sometimes at variance with those of the Administration. No governmental interest here can possibly justify such governmental intrusion; and the Court has never remotely sanctioned incursions such as these.

ARGUMENT

I. THE ABA COMMITTEE IS NOT AN "ADVISORY COMMITTEE" WITHIN THE MEANING OF THE FEDERAL ADVISORY COMMITTEE ACT.

In the opinion below, the district court first concluded that the ABA Committee was an "advisory committee" subject to the Act's full range of organizational, regulatory, and disclosure requirements.[11] In light of that conclusion, the court then deemed it necessary to reach and resolve the question of the Act's constitutionality under the Appointments Clause.[12] In fact this Court need not reach that issue—or any of the constitutional questions presented here. The structure and legislative history of the Act demonstrate that Congress never intended it to cover groups such as the ABA Committee because they were not established by or for any government agency or government-funded agency.

A. The Structure of the Act Shows That Congress Intended Only To Regulate Advisory Committees Created By or For the Federal Government.

The Act defines an "'advisory committee'" as:

> any committee . . . which is—
>
> (A) established by statute or reorganization plan, or

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[11] *Washington Legal Foundation v. Dept. of Justice*, 691 F. Supp. 483, 491 (D.D.C.) ("*WLF*"), *jurisdiction noted*, 109 S. Ct. 526 (1988).

[12] *Id.* at 491-92.

> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . .[13]

There is no suggestion, by either appellants or the court below, that the ABA Committee comes within the scope of paragraph (A). Nor can it be contended that the Committee was "established" by the President or an agency under Paragraph (B) or (C). Thus, if the Committee is covered by the Act at all, it is only because it has been "utilized" by the President or by an agency.[14]

The court below correctly acknowledged that "reliance on the plain language of FACA alone is not entirely satisfactory because FACA 'contains a very broad, imprecise definition, and in this respect is not a model of draftsmanship. . . .'"[15] Despite this admonition, the district court did precisely what it had warned against: relying principally on the dictionary, rather than the Act itself, the court gave the term "utilized" an exceedingly literal construction, sweeping into the Act's regulatory regime not only the ABA Committee, but any group of private individuals that receives information from and offers advice to any federal agency.[16]

It is of course true that the President "utilizes" the ABA Committee, in the literal sense that he and the Department of Justice at times "make use of" the Committee's ratings of judicial nominees.[17] But to extend the Act's coverage to every "committee, board, commission, council, conference, panel, task force, or other similar group" [18] whose advice or recommendations any federal agency has ever "made use of" is to give the federal government a kind of reverse Midas touch—the power to turn any private entity whose advice is ever heeded into a part of the federal bureaucracy. That expansive reading is fundamentally at odds with the structure and purpose of the Act.

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[13] Act § 3(2).

[14] Act §§ 3(2)(B), (C).

[15] *WLF*, 691 F. Supp. at 488 (citations omitted).

[16] *Id.*

[17] *Id.* There is no legal requirement that the Committee be consulted at all; and the Executive has no legal or other obligation ever to accept the Committee's advice. It is noteworthy that of the eleven prospective nominees whom the Committee rated "not qualified" between 1977 and 1984, the President nominated more than

As Justice Frankfurter long ago noted: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated." [19] Whatever else in the Act may be imprecise, one thing is clear: Congress passed the Act because of mounting concern over the proliferation of federal advisory committees, and the attendant drain they imposed on the human and financial resources of the federal government.[20]

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half. D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 94 (1988).

[18] Act § 3(2).

[19] *United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

[20] In the extensive legislative history preceding passage of the Act, members of Congress repeatedly voiced concern about the vast amount of federal money (estimated in 1971 at $75 million annually) spent on the work of advisory committees, that in many instances were "inactive, meaningless, obsolete [or] redundant." H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970). *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 3, 5-6 (1972); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 58, 61 (1971); 118 Cong. Rec. 16,296, 16,297-98, 16,301-02 (1972) (remarks of Reps. Holifield & Moss); 118 Cong. Rec. 30,269, 30,272, 30,280 (1972) (remarks of Sens. Metcalf & Roth); 118 Cong. Rec. 31,224, 31,225 (1972) (remarks of Sen. Percy). As the House Committee noted, in one particularly egregious instance a Presidential advisory committee spent $1.8 million in federal money to produce a report that the President rejected even before it had been issued. H.R. Rep. No. 1731, 91st Cong., 2d Sess. 12 (1970).

The Act was plainly an effort to limit, rather than increase, the number of such groups. Thus, the first section of the Act carries an explicit congressional directive that the number of such committees "be kept to the minimum necessary," that new advisory committees "be established only when they are determined to be essential," and that existing committees "be terminated when they are no longer carrying out the purposes for which they were established." [21] To read the Act to cover a private group simply because the Executive has made use of its advice is to ignore Congress' fundamental intent.

Every other portion of the statute also plainly suggests an intention to regulate only committees that, unlike the ABA,[22] were created by or for the federal government or government-funded entities. Thus, in the prefatory language of the Act Congress mentioned only committees "which have been *established* to advise officers and agencies in the executive branch. . . ." [23] That this language refers to committees established by the government or government-funded entities is confirmed by the succeeding portions of the Act. Those confer upon the Executive the authority and responsibility to perform a panoply of duties that make sense only with respect to quasi-governmental bodies created by or for the federal government and responsible to it. Most significantly, the Act confers upon the President (and in some instances, the Congress) the power to create and terminate federal advisory committees—powers that could hardly apply to a voluntarily-formed group of private citizens who share information with their government.[24] The Act requires that federal officials attend all advisory committee meetings,[25] a matter emphasized in the conference report, which stated that "a designated officer or employee of the Government [must] attend each advisory committee meeting. No such meeting may be conducted in his absence or without his approval." [26] In addition, the Executive has the responsibility and duty to establish "uniform fair rates of pay" for committee members; [27] to "prescribe administrative guidelines and management controls applicable to advisory committees"; [28] to report to the Congress within a designated time period either adopting each committee's recommendations or explaining the reasons for rejecting them; [29] to keep records of all funds at the committee's disposal; [30] and to "provid[e] support services for each advisory committee established by or reporting to it." [31]

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[21] Act §§ 2(b)(2) & (3).

[22] The ABA was privately created in 1878. The ABA Committee was created in 1946, six years before the Department of Justice began to supply the names of prospective nominees to the Committee. *See* notes 2 & 4 *supra*.

[23] Act § 2(a) (emphasis added).

[24] *See, e.g.*, Act §§ 6(c), 9(a), 14(a), (b).

Likewise, the Act imposes upon each federal advisory committee and its members a host of obligations that have no discernible purpose when applied to private organizations not created by or for the federal government. Thus, if Congress had in mind private organizations like the ABA Committee, it is unthinkable that it would have imposed requirements for composition of membership; [32] or prohibited members from "meet[ing] or tak[ing] any action" until they had filed a charter specifying, *inter alia*, their objectives and the scope of their activities, the period of time necessary for them to complete their purpose, the federal officials responsible for providing them support, their estimated annual operating costs, and their expected termination date.[33] These requirements are consistent only with a congressional purpose to regulate committees formally created by statute, the President, or a federal agency or government-funded agency.[34]

B. The Legislative History of the Act Shows That It Was Not Intended To Cover Entities Like the ABA That Were Not Created "By or For" the Government.

The extensive legislative history of the Act confirms that Congress never intended it to cover entities like the ABA Committee that were not created "by or for" the government.

Initially, each chamber adopted a bill whose scope was expressly limited to advisory committees created by the federal government.[35] Neither bill contained any reference to committees "utilized" by the government. Rather, that phrase appeared for the first time in the bill approved by the Conference Committee.[36] The Conference Report offered no explanation for this change, other than to say that "[t]he conference substitute . . . adopts the House definition of 'advisory committee' with modification." [37] While the Conference Committee report is silent as to why the term "utilized" was added, its purpose is quite clear. The legislative history shows that the Conference Committee's addition was designed to do no more than resolve a relatively minor ambiguity in the Act.

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[25] Act § 10(e).

[26] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 11 (1972).

[27] Act § 7(d)(1).

[28] Act § 7(c).

[29] Act § 6(b).

[30] Act § 12(a).

[31] Act § 12(b).

[32] Act § 5(b)(2).

[33] *See* Act § 9(c).

[34] *See American Tobacco Co. v. Patterson*, 465 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible.")

[35] The House bill defined "advisory committee" as "any committee . . . which is . . . (A) established by statute or reorganization plan, or (B) established by the President, or (C) established by one or more agencies, ..." 118 Cong. Rec. 16,296, 16,300 (1972). Likewise, the Senate bill covered only committees "established or organized under any statute or by the President or any officer of the Government for the purpose of furnishing advice, recommendations, or information to any officer or agency, or to any such officer or agency and to the Congress . . . ." 118 Cong. Rec. 30,269, 30,269 (1972).

[36] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 2 (1972). *Compare id.* (Conference Report) *with* 118 Cong. Rec. 16,296, 16,300 (1972) (House bill as passed).

[37] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 9 (1972).

During the earliest Senate hearings on the subject, the Congress directed the Office of Management and Budget ("OMB") to produce a complete listing of all existing advisory committees that would be covered by the Act. For this purpose, OMB relied upon a 1962 Executive Order, No. 11007, which defined "advisory committee" to include "any committee, board, commission, council, conference, panel, task force, or other similar group" that is either "formed by a department or agency of the Government" or "is being *utilized* by a department or agency in the same manner as a Government-formed advisory committee." [38]

The Executive Order was not designed to reach groups not formed by or for the government, as shown by OMB's response to Congress' request in 1971 to list all Advisory Committees covered by the Executive Order.[39] After conducting an exhaustive survey of every federal department and agency, including the Department of Justice, OMB produced a list of all existing federal advisory committees, as defined in the Executive Order; and the list was placed in the legislative record.[40] So far as Amici can determine, every entity listed was something created or established by the government or a government-funded agency. Even if that were not the case, OMB's working assumption, and the assumption of Congress in passing the legislation, was that the list included only committees "organized" or "established" or "formed" by the federal government.[41] Indeed, the

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[38] Exec. Order No. 11007 § 2(a) (1962) (emphasis added).

[39] *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701, 702 (1971).

[40] *Id.* at 701-750.

[41] H.R. Rep. No. 1017, 92d Cong., 2d Sess. 2-4 (1972); S. Rep. No. 1098, 92d Cong., 2d Sess. 3, 7 (1972); H.R. Rep. No. 1731, 91st Cong., 2d Sess. 10-11, 25 (1972).

vast majority of the committees on the list were expressly identified as having been created by a specific act of either Congress or the Executive. Virtually every entity actually included the term "advisory committee," or "task force," or a similar designation in its title, indicating that it was created at the government's behest.[42]

Most significantly, although OMB's list names 1162 federal advisory committees, including six committees associated with the Department of Justice, it makes no mention of the ABA or the ABA Committee. That omission could hardly be ascribed to oversight; certainly Congress, the Department of Justice, and OMB all knew that for more than two decades the ABA Committee had been actively involved in advising both the Executive Branch and the Senate about the qualifications of judicial nominees. Moreover, although many committees were named by OMB and others were discussed during the lengthy congressional hearings and debates,[43] the legislative record contains no hint that anyone in Congress believed the ABA or other groups not created by or for the government would be covered.

The OMB list became the focus of the congressional committees as the bill progressed through the House and

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[42] *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701-750 (1971). A private group established at "the request of" a federal agency would, of course, be considered to have been "established" for the government. For example, the Advisory Council on Federal Reports was considered to be "established" by the Office of Management and Budget because it was "organized by several national business organizations at the request of the Office of Management and Budget." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). As noted earlier, that is not the case with respect to the ABA Committee.

[43] *E.g.*, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 16 (1970); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 14-16, 24, 40 (1971); 118 Cong. Rec. 16,296, 16,302-03 (1972) (remarks of Rep. Dingell).

Senate.[44] The crux of the legislation, as reflected in both the language of the bills and the committee reports, continued to be on committees "established," "organized," or "create[d]" by the federal government.[45] While there was concern that OMB might have omitted certain advisory committees because of the difficulties of compiling a comprehensive list,[46] no dissatisfaction was expressed with the standard used in compiling the list, with one exception relevant here.[47] That exception concerned a committee " 'not formed by a department or agency, when it is being *utilized by* a department or agency' "[48]—a category which the House Committee believed had been improperly excluded.[49] What is significant, however, is that the advisory committees that the House Committee believed should have been included were not privately-created organizations like the ABA, but rather were (1) advisory committees formed by or for the federal government before the effective date of

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[44] H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970) (*passim*); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 77-78 (1971); *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701-750 (1971).

[45] S. Rep. No. 1098, 92d Cong., 2d Sess. 6-7 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 1 (1972).

[46] H.R. Rep. No. 1017, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 1731, 91st Cong., 2d Sess. 10-11, 13-14 (1970); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 77-78 (1971); 118 Cong. Rec. 31,420, 31,421 (1972) (remarks of Rep. Holifield).

[47] The House Committee also expressed concern that OMB's standard did not include committees composed wholly of officers or employees of the federal government, and that it did not include committees established by Congress or formed by the President. H.R. Rep. No. 1017, 92d Cong., 2d Sess. 3-4 (1972).

[48] H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970) (emphasis added; citation omitted).

[49] *Id.*

the Act, and (2) organizations created by groups such as the National Academy of Sciences ("NAS") which entities themselves were organized by the government and were quasi-governmental in nature.[50]

It was evidently this concern that ultimately led the Conference Committee to amend the language to include groups "utilized" by the government. There is no suggestion anywhere in the committee reports, the floor debates, or any other legislative history cited by appellants that the term "utilized" was intended to include groups that were not created by or for the federal government.[51] Indeed, the very language of the Conference Report shows the contrary, stating:

> The Act does not apply to persons or organizations *which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.*[52]

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[50] *Id.* Ironically, a committee formed by the NAS has since been held *not* to be subject to the Act. *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

[51] The best that appellants can find in the entire legislative history is this snippet in the Senate report:

> The intention is to interpret the words "established" and "organized" in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill.

Brief of Appellant Washington Legal Foundation at 21, *citing* S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972) (appellant's emphasis omitted). *See also* Brief for Appellant Public Citizen at 21 (citing same).

Amici do not dispute that the Senate meant to cover a broad range of groups "established" or "organized" by the government. But the passage does not support the position for which appellants cite it; namely, the contention that the term "utilized" applies to groups *not* established by or for the government. To the contrary, the passage strongly suggests that only groups "established" or "organized" by the government would be covered.

[52] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972) (emphasis added).

Thus the Conference Committee intended to exclude private organizations having formal contractual relationships with the government[53] and, even more broadly, to exclude all organizations "not directly established by or for such [Federal] agencies." The ABA Committee was not "directly established by or for" any federal agency.[54] Accordingly, as the Conference Report plainly indicated, the Committee is not subject to the Act.[55]

C. Neither the GSA Regulations Nor Judicial Authority Supports the District Court's Construction of the Act.

The lower court also erred in relying upon recently-adopted GSA regulations, which purport to extend the Act's reach to any committee which a federal agency "utilizes" as " 'a preferred source from which to obtain advice or recommendations . . . .' "[56] To be sure, those regulations define "utilized" very broadly.[57] But they do not purport to cover entities not created by or for the federal government, as the court apparently believed.[58]

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[53] *See also* H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970).

[54] The ABA Committee was established by the ABA, not at the request of the federal government, six years before it began to receive the names of prospective nominees from the Department of Justice. *See* D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 83 (1988); 77 A.B.A. Ann. Rep. 215-17 (1952). Appellant Public Citizen concedes that "the ABA Committee was not 'established' by the Justice Department . . . ." Brief for Appellant Public Citizen at 16.

[55] Appellant Public Citizens contends that the ABA Committee is covered by this legislation because it receives information from the Department of Justice that is not available from other sources, and because the Department receives recommendations from the ABA Committee. Brief for Appellant Public Citizen at 16-17. As discussed in text, it is not the receipt of information and the rendering of advice that determine whether a group will be subject to the Act, but the circumstances of the group's creation.

[56] *WLF*, 691 F. Supp. at 488 (citation omitted).

[57] 41 C.F.R. § 101-6.1003 (1987).

[58] *WLF*, 691 F. Supp. at 488.

Even if they did, the regulations would have no binding force here. The agency has no authority to expand the scope of the Act.[59] Moreover, the definition in question was not a contemporaneous construction of the legislation, but was first adopted more than ten years after passage of the Act.[60] Thus, it obviously sheds no light on Congress' original intention.[61] Far more significant than the amorphous language of the recent GSA regulations is the GSA's consistent conduct over the past seventeen years. During each of those years, since the inception of the Act, the GSA has published an annual report listing every federal advisory committee that in its judgment is covered by the Act. Not even the most recent of these reports—the one for fiscal year 1988, which specifically includes the GSA's interpretive regulations[62]—lists the ABA Committee.[63]

Similarly, before the present decision, so far as we are aware, no case had ever held that the Act reached organizations not created "by or for" the government.[64]

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[59] *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 219-20 (1920). *Cf. Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

[60] Federal Advisory Committee Management, 48 Fed. Reg. 19,324 (1983).

[61] "It is well established that the prestige of a statutory construction by an agency depends crucially upon whether it was promulgated contemporaneously with enactment of the statute . . . ." *Barnett v. Weinberger*, 818 F.2d 953, 960-61 (D.C. Cir. 1987) (footnote omitted). *See General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (administrative interpretation entitled to little deference when first promulgated eight years after enactment).

[62] General Services Administration, Seventeenth Annual Report of the President on Federal Advisory Committees (1988).

[63] *See BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983).

[64] *See Consumers Union of United States, Inc. v. Department of Health, Educ. & Welfare*, 409 F. Supp. 473 (D.D.C. 1976), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977) (meetings between trade association and government officials on association's regulatory proposals not subject to Act).

The cases upon which appellants rely, while containing language supporting a broad construction of the statutory language, in fact did not hold that organizations like the ABA Committee are subject to the Act. Neither *Center for Auto Safety v. Tiemann,*[65] which concerned an organization made up entirely of federal and state government officials, nor *National Nutritional Foods Association v. Califano,*[66] in which five physicians met at the federal government's request, held that groups not created "by or for" the government are subject to the Act.

D. The Existence of Serious Constitutional Questions Also Supports a Limiting Construction.

Finally, the existence of serious constitutional questions presented by application of the Act to the ABA Committee strongly supports a limiting construction. From the very beginning, this Court has recognized the principle that statutes should be construed to avoid constitutional questions,[67] and this was reiterated again just last Term:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle . . . has for so long been applied by this Court that it is beyond debate.[68]

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[65] 414 F. Supp. 215 (D.D.C. 1976), *aff'd in part on other grounds sub nom. Center for Auto Safety v. Cox,* 580 F.2d 689 (D.C. Cir. 1978).

[66] 603 F.2d 327 (2d Cir. 1979).

[67] *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.") *Cf. Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

[68] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 108 S. Ct. 1392, 1397 (1988) (numerous citations omitted).

Applying this principle, the Court has frequently construed the literal language of a statute narrowly in order to avoid constitutional questions.[69] In cases that are particularly germane here, the Court has crafted from the literal language of the antitrust laws a broad exemption permitting otherwise unlawful collaborations for the purpose of lobbying Congress and the Executive. In *Noerr Motor Freight*[70] the Court held that the explicit prohibition in the Sherman Act against any "contract, combination . . . or conspiracy, in restraint of trade" could not be construed to bar a combination of railroads designed to restrain trade by urging Congress to adopt legislation.[71] The Court rejected the proposition that "the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws[,]"[72] in large part on the ground that such an application of the Sherman Act would invade the railroads' First Amendment rights and "we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[73] The Court subsequently applied this First Amendment doctrine in *United Mine Workers v. Pennington,*[74] holding the Sherman Act inapplicable to a combination by which a union and large coal operators had conspired to drive smaller companies out of business, by jointly persuading the Secretary of Labor to establish an artificially high minimum wage.[75]

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[69] *United States v. Walter,* 263 U.S. 15 (1923), for example, construed a statute which made it an offense to commit certain frauds against "*any corporation* in which the United States of America is a stockholder." *Id.* at 17 (emphasis added). Brushing aside an argument that the language was "too clear to be cut down," *id.* at 17-18, the Court restricted its meaning to corporations that are instrumentalities of the government, *id.* at 18, on the ground that a broader reading would exceed Congress' constitutional authority. *Id.* at 17. *See also The Vessel "Abby Dodge" v. United States,* 223 U.S. 166, 172-73, 175 (1912).

[70] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

[71] *Id.* at 129 n.1, 136.

[72] *Id.* at 137.

[73] *Id.* at 138.

[74] 381 U.S. 657 (1965).

As we discuss in the next section, the First Amendment questions presented by application of the Act to the ABA Committee are no less serious than those that led the Court in *Noerr* and *Pennington* to construe the Sherman Act narrowly. They should lead to the same narrowing construction here.[76]

II. APPLICATION OF THE ACT TO THE ABA COMMITTEE WOULD INFRINGE THE FIRST AMENDMENT RIGHTS OF BOTH THE ABA AND AMICI.

Subjecting the activities of the ABA Committee to an intrusive regime of government oversight would deny the ABA, Amici, and the public at large their core First Amendment rights. That denial is particularly unwarranted here since no government interest even remotely justifies such a result.[77]

The activities of the ABA Committee consist substantially of: (1) communications concerning the qualifications of prospective nominees to the federal bench, both with the prospective nominee and with third persons; (2) discussions and deliberations to exchange views on that same subject; and (3) submission of the Committee's collective opinion to the government.[78] The pertinent activities of the Amici consist of supplying information and advice to the ABA Committee. As the *Noerr* and *Pennington* cases make clear, the First Amendment unequivocally protects the right to engage in each of these activities—"to speak freely, to advocate ideas, to associate with others, and to petition [the] government . . . ."[79]

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[75] *Id.* at 660.

[76] The briefs of the Department of Justice and the American Bar Association will presumably address at length the constitutional separation of powers issues presented by application of the Act to the ABA Committee. The existence of these questions provides an independent reason to construe the Act as inapplicable to the ABA Committee.

[77] As a threshold matter, appellants err in suggesting that this Court may not reach the First Amendment issue merely because the ABA did not "present its First Amendment argument to the District Court." Brief for Appellant Public Citizen at 42; *see also* Brief of Appellant Washington Legal Foundation at 43. JA 62-63. In any event, this Court has ample authority to affirm on any legal ground, including grounds not passed upon below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).

Indeed, the activities of the ABA Committee and the related activities of these Amici and others qualify for the very highest level of constitutional protection. The First Amendment grants members of the Committee, together with any persons whom they consult, a privilege to carry on what this Court has often called an "'unfettered interchange of ideas'"[80] free of interference by the government.

The decisions of this Court additionally establish beyond question that the Constitution permits not only the free expression of views, but also their development in concert. The Court has long acknowledged the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances. . . ."[81] "[T]he close nexus between the freedoms of speech and assembly"[82] promotes "[e]ffective advocacy of both public and private points of view, particularly controversial ones. . . ."[83]

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[78] *See* JA 43-52.

[79] *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979) (per curiam).

[80] *E.g., Meyer v. Grant*, 108 S. Ct. 1886, 1891 (1988) (citation omitted).

[81] *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). *Accord, Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1947 (1987).

[82] *National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 460 (1958).

[83] *Id.*

To be sure, the government here does not seek to prohibit either the activities of the ABA Committee or the activities of these Amici. But application of the Act would nevertheless substantially impede those activities and communications. If applied to the ABA Committee, the Act would require the Committee to (1) meet only with the permission of, and in the presence of, a designated officer or employee of the government;[84] and (2) file a charter with the Administrator of the General Services Administration before the Committee "meet[s] or take[s] any action."[85] The Act would also require the Committee automatically to "terminate" after two years unless the Department of Justice renews its existence for successive two-year periods.[86] In addition, the Act would require the Committee to open all meetings to the public and invite interested members of the public to participate,[87] make available transcripts of all meetings,[88] and disclose all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents *which were made available*" to the Committee.[89] Often the documents required to be disclosed would include materials or information provided by these Amici. Such public disclosure may be avoidable under the Act,[90] but disclosure to the Executive Branch is not; and only the government has the authority to decide which materials if any may be withheld from the public.[91]

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[84] Act §§ 10(e), (f).

[85] Act § 9(c).

[86] Act § 14(a).

[87] Act §§ 10(a)(1), (3).

[88] Act § 11(a).

[89] Act § 10(b) (emphasis added).

[90] Act § 10(d). The President or agency head can close a meeting if he determines that it meets one of the criteria listed in 5 U.S.C. § 552b(c). Act § 10(d).

[91] *See* Act § 10(b), *referring to* 5 U.S.C. § 552(b).

The decisions of this Court make clear that compelled disclosure of the internal affairs of a private organization by government may interfere with First Amendment rights. For example, in the landmark case of *National Association for the Advancement of Colored People v. Alabama*,[92] the Court held that compelled disclosure by the government of private membership lists violated the First Amendment. This Court has often recognized the "vital relationship between freedom to associate and privacy in one's associations,"[93] and has found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[94]

This protection, of course, is not absolute. In situations where private organizations seek to influence government activity, this Court has sustained requirements for disclosure of the names and addresses of persons contributing to organizations engaged in political campaigns and lobbying activities,[95] so long as the organization would not suffer retribution from the disclosure.[96] But the Court has never remotely sanctioned incursions as intrusive as those imposed by the Act, which requires extensive disclosure of the internal discussions of the organization to the government.[97]

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[92] 357 U.S. 449 (1958).

[93] *Id.* at 462.

[94] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). *Accord Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91 (1982). This Court has long recognized that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64.

[95] *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Harriss*, 347 U.S. 612 (1954).

[96] Organizations that legitimately fear retribution from such disclosure are constitutionally exempt even from campaign contribution disclosure requirements. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

[97] In *Buckley v. Valeo*, 424 U.S. 1 (1976) for example, the Court upheld a federal statute requiring certain disclosures relating to

There can be little question here that the adverse impact flowing from application of the Act would place an intolerable burden upon the exercise of protected First Amendment rights. The right of assembly has little meaning if a private group of citizens may not convene in its own name without first seeking leave of the government, without a government representative in its midst to monitor members' speech, and if the group's existence may be terminated by the government. The Act also would adversely affect Amici and similar groups. As noted above, the government's positions on particular candidates is sometimes different from those of Amici, and disclosure to the government would make the existing process of confidential communication and advice impossible.[98]

The dangers of pervasive government intrusion are particularly evident here. Members of the ABA Committee are in contact with third parties, including representatives of these Amici, on a confidential basis in the

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election campaign contributions, in part to deter corruption and to help enforce limitations on contributions. *Id.* at 66-68. No disclosure of internal discussions was involved, and the Court was scrupulous in ascertaining that associational interests were not at risk. Similarly, in *United States v. Harriss*, 347 U.S. 612 (1954), the Court upheld a statute requiring lobbyists to file certain financial information, including the names and addresses of persons whom they represented, on the ground that such disclosure was justified by the need to maintain governmental integrity. Again no disclosure of internal discussions was required.

[98] Appellant Public Citizen asserts that *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978), rejected a similar First Amendment claim. Brief for Appellant Public Citizen at 42-43. That case, however, is readily distinguishable: Its only First Amendment issue concerned communications from the committee to the government—not, as here, communications within the committee and between the committee and third parties. 580 F.2d at 694. Moreover, the committee in *Center for Auto Safety* was formed entirely of state and federal officials acting in their public capacity, and the federal government paid part of its expenses. 580 F.2d at 690. No such factors exist here.

course of their investigations.[99] Many of these contacts have been made with the ABA Committee simply because the organizations and individuals involved have been unwilling to share their information with the Department of Justice. If those discussions with the ABA Committee were disclosed to government officials, few members of the public (and even fewer lawyers) would be willing to offer the sort of frank and candid information that is essential to the selection process. Chilling such expression would not only cripple that process; it would also deprive citizens, including Amici, of their constitutional rights.[100]

Appellant Washington Legal Foundation ("WLF") argues that the ABA Committee should receive no First Amendment protection because it performs "public or quasi-public functions." [101] In this respect WLF appears to be making two separate arguments. The first is that the ABA Committee has forfeited its First Amendment rights because it is engaged in state action.[102] There is simply no support for this view.[103] It is absurd to suggest that the ABA Committee becomes a public body merely by receiving information and offering its views to the government. The government cannot take away a private body's First Amendment rights merely by relying on its advice. Nor does a private organization become a public body by virtue of the Committee's receipt of information not made available to other organizations.[104] There also can be no serious contention that these Amici are state actors or that they are required to forfeit their First Amendment rights as a condition of participation in the process.

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[99] JA 47-48, 50-52.

[100] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (chilling right of association). *See also United States v. Jackson*, 390 U.S. 570, 582 (1968) ("The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.") The availability of a forum in the Senate confirmation process does nothing to relieve this unconstitutional intrusion.

[101] Brief of Appellant Washington Legal Foundation at 43.

[102] The state action argument in any event is irrelevant to the question of First Amendment protection, since the ABA Committee can both be engaged in state action and be entitled to First Amendment protection. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

[103] Appellants cite *Rouse v. Judges of the Circuit Court*, 609 F. Supp. 243, 244-45 (N.D. Ill. 1985) for the proposition that the ABA Committee engages in state action. Brief of Appellant Washington Legal Foundation at 43. In *Rouse*, however, the bar committee investigating prospective judges had a governmentally-conferred veto power over potential candidates. 609 F. Supp. at 244-45. That is not the case here. *See* note 17 *supra*.

Second, relying upon *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), WLF argues that the Act advances a compelling state interest that overrides the ABA's First Amendment rights.[105] The facts of this case are readily distinguishable from *Roberts*. There the Court found that the government's demonstrated objective—the eradication of gender-based discrimination—was both compelling and unrelated to any effort to suppress speech.[106] Moreover, the Jaycees were utterly unable to demonstrate that the state's anti-discrimination legislation "impose[d] any serious burdens on the male members' freedom of . . . association." [107]

The circumstances presented here are demonstrably different. The impact upon the ABA and these Amici is clear. None of the specific governmental objectives articulated in the statute [108] or the legislative history could be

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[104] We note that particular press organizations often receive information from government officials. That receipt hardly deprives them of their First Amendment rights.

[105] Brief of Appellant Washington Legal Foundation at 44.

[106] 468 U.S. at 623-24.

[107] *Id.* at 626. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), also cited by WLF, is distinguishable on the same basis. *See id.* at 78 (law firm "has not shown how its ability to fulfill [protected] function[s] would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits").

[108] The government's public interest objectives are specified in the "purposes" subsection of the Act. Act § 2(b).

deemed "compelling." [109] Whatever interest the government may have in limiting the number of advisory committees staffed with federal employees and funded with federal dollars is not advanced by applying the Act to a private body that accepts no government funding.

Nor does an abstract interest in disclosure support application of the legislation to the ABA. At least without some evidence of corruption or wrongdoing,[110] requiring disclosure of the ABA Committee's internal deliberations to the government serves no compelling interest, and cannot justify the significant burden on the expressive rights of the ABA and Amici and other members of the public.[111]

There is here no evidence of corruption or improper influence by the ABA or others who participate with it in the nomination process. Contrary to the suggestion of appellant Public Citizen that the ABA Committee "accepts the benefits of being utilized," [112] the only benefit the ABA accepts for its advice is the one all Americans enjoy—the benefit that flows from a judiciary whose members strive to meet the highest standards.

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[109] A long line of decisions establishes unequivocally that "no showing merely of a rational relationship to some colorable state interest" justifies a substantial infringement of First Amendment rights. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

[110] *See Buckley v. Valeo*, 424 U.S. at 66-68; *United States v. Harriss*, 347 U.S. at 625.

[111] Even where there is a compelling interest in controlling corruption, no decision of this Court has required disclosure of the internal workings of the organization. *See* note 97 *supra*.

[112] Brief for Appellant Public Citizen at 44.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Respectfully submitted,

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